UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	)	
	)	
MIKE MAHER AL-SEDAH,	)	**Case No. 04-44030**
	)	
Debtor.	)	

In re:	)	
	)	
MIKE MAHER AL-SEDAH,	)	
	)	
Debtor.	)	**Contested Matter**
vs.	)	
	)	
STATE OF ALABAMA	)	
DEPARTMENT OF REVENUE,	)	
	)	
Claimant.	)	

MEMORANDUM OPINION AND ORDER

This contested matter is before the Court following a hearing on June 22, 2005, on the *Objection to Claim* filed by the Debtor, Mike Maher Al-Sedah (the "Debtor") and the *Objection to Confirmation* and *Motion to Dismiss* filed by Linda B. Gore, the Chapter 13 Trustee ("Trustee"). Appearing at the hearing were: Luther Abel, attorney for the Debtor; David Avery, III, attorney for the Claimant, the State of Alabama Department of Revenue ("Revenue Department") and the Trustee. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding as defined in 28 U.S.C. §§

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[1] 28 U.S.C. § 151 provides:

157(b)(2)(B) & (L).[2] The Court has considered the pleadings, the briefs, the arguments of counsel and the law and finds and concludes as follows.[3]

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2)(B) & (L) provide:

(b)(2)Core proceedings include, but are not limited to–

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; ...

(L) confirmation of plans.

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy

I. FACTUAL BACKGROUND

The Debtor owned and operated three convenience stores located in Etowah County, Alabama. Following a 2003 audit by the Revenue Department, the Debtor was assessed sales tax on the businesses for October 1996 through December 2002. The Revenue Department entered a Final Assessment ("Final Assessment") of the taxes due on July 9, 2003.

The Debtor sought an administrative review of the Revenue Department's Final Assessment by appealing to the Revenue Department's Administrative Law Division pursuant to ALA. CODE § 40-2A-7(b)(5)a.[4] A hearing on the Debtor's appeal was held before the Chief Administrative Law Judge Bill Thompson on August 12, 2004. On November 3, 2004, a ten-page *Final Order* was entered affirming the Final Assessment and entering a judgment against the Debtor for "[s]tate sales tax, penalty, and interest of $498,169.86."[5] The *Final Order* also stated "[a]dditional interest is also due from the date of entry of the final assessment, July 9, 2003."

The Debtor filed a *Motion to Amend, Alter or Vacate or in the Alternative for a New Trial* on November 24, 2004. Judge Thompson denied the motion because it was not filed within 15-days

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pursuant to Federal Rule of Bankruptcy Procedure 7052.

[4] ALA. CODE § 40-2A-7(b)(5)a provides:

> A taxpayer may appeal from any final assessment entered by the department by filing a notice of appeal with the Administrative Law Division within 30 days from the date of entry of the final assessment, and the appeal, if timely filed, shall proceed as herein provided for appeals to the Administrative Law Division.

[5] The *Final Order* included an extensive recitation of the underlying facts and a detailed legal analysis.

from entry of *the Final Order* as required by ALA. CODE § 40-2A-9(f).[6]

The Debtor filed this Chapter 13 bankruptcy case on December 2, 2004. The Debtor scheduled the Revenue Department as having an unsecured priority claim of $498,170.00. According to the Debtor's schedules his total unsecured debt was $677,494.94 at the time of filing.

The Revenue Department filed a proof of claim for $516,101.46 on May 4, 2005. The claim was broken down into unsecured priority ($286,434.70 in tax and $86,246.93 in prepetition interest) and unsecured non-priority ($143,419.80 in unsecured penalty) portions. The Debtor filed an *Objection to Claim* ("Objection") on May 13, 2005 which was set for hearing on June 22, 2005. As grounds for the Objection the Debtor stated "non-priority amounts are included such as interest and penalties ... also the tax claimed is disputed." In the Objection the Debtor admitted to owing $90,000.00. The Revenue Department filed a *Response to Objection to Claim* on June 1, 2005.

Following the June 22, 2005, hearing the Debtor filed a *Brief in Support of Rebuttal of Presumption of Correctness and Objection to Claim* ("Brief") on June 28, 2005. In the Brief the Debtor argues the *Final Order* is "based on error [and is] excessive," alleging several procedural and evidentiary errors made by the administrative law judge. He also claims to be "effectively prevented ... from applying for judicial review in Circuit Court" because he is unable to either fully pay the tax or post a supersedeas bond in double the amount of the assessment as required by ALA. CODE § 40-2A-9(g)(1). The Brief concludes that "[t]he effective denial of further Judicial review and obvious and well documented errors [by the administrative law judge] should allow the [Debtor] to use the

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[6] ALA. CODE § 40-2A-9(f) provides in pertinent part:

> Either the taxpayer or the department may file an application for rehearing within 15 days from the date of entry of a final order by the administrative law judge.

powers of the U.S. Bankruptcy Court to arrive at the correct priority amount" and requests a "judicial review" by this Court to "determine the proper amount of the priority debt and the non-priority debt and that [sic] the court award." The Revenue Department filed a *Response to Brief of Debtor* on June 30, 2005.

The Trustee filed an *Objection to Confirmation of Plan and Motion to Dismiss* on May 18, 2005 arguing, *inter alia*, the Debtor is not eligible to be a Chapter 13 debtor because his unsecured debt exceeds the statutory limit under 11 U.S.C. § 109(e). The Trustee's *Objection to Confirmation* and *Motion to Dismiss* were both heard by the Court at the June 22, 2005 hearing.

II. CONCLUSIONS OF LAW

A. The *Rooker-Feldman* doctrine

Under the *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction to engage in appellate review of state court determinations. See, e.g., Greenberg v. Zingale, 2005 W.L. 1432471, at *3 (11th Cir. June 20, 2005)(citing Powell v. Powell, 80 F.3d 464, 466 (11th Cir. 1996)). Simply put, the *Rooker-Feldman* doctrine is applied to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 125 S.Ct. 1517, 1521 (2005).

A final order entered by an administrative law judge has the "the same force and effect as a final order issued by a circuit judge sitting in Alabama" unless it is altered or amended on appeal. ALA. CODE § 40-2A-9(e) (1975). Therefore, collateral attack of orders by administrative law judges is also barred by the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine is applicable in bankruptcy proceedings. See, e.g., Goetzman

v. Agribank, FCB (In re Goetzman), 91 F.3d 1173 (8th Cir. 1996); Besing v. Hawthorne (Matter of Besing), 981 F.2d 1488 (5th Cir. 1993); In re Flury, 310 B.R. 659 (Bankr. M.D. Fla. 2004); Fowler v. Jenkins (In re Fowler), 258 B.R. 251, 262 (Bankr. N.D. Ala. 2001); In re Optical Tech., Inc., 272 B.R. 771 (Bankr. M.D. Fla. 2001); In re Johnson, 210 B.R. 1004 (Bankr. W.D. Tenn. 1997). Application of the *Rooker-Feldman* doctrine is especially applicable in the claims litigation process. Where a debtor objects to a claim that is based on a state court judgment, thereby attempting to collaterally attack the judgment in bankruptcy court, the *Rooker-Feldman* doctrine bars that attack. See In re Audre, Inc., 202 B.R. 490, 494-99 (Bankr. S.D. Cal. 1996); Johnson, 210 B.R. at 1007 (*Rooker-Feldman* doctrine bars court from hearing debtor's objection to claim where claim is based on a valid administrative order).

The relief sought by the Debtor is exactly what is prohibited by the *Rooker-Feldman* doctrine. His *Objection* is based solely on alleged errors made by the administrative law judge in affirming the Final Assessment. He is, in no uncertain terms, asking this federal Court to act as an appellate court and review the *Final Order* entered by the state administrative law judge. In fact, he requests a "judicial review" of the *Final Order* to determine the "proper amount"of the Final Assessment because of the alleged procedural and evidentiary errors. If the administrative law judge erred to the extent claimed by the Debtor, relief is available through the Alabama state courts. This Court is not the proper forum for such relief.

B. Chapter 13 eligibility under 11 U.S.C. § 109(e)

Section 109(e) of the Bankruptcy Code provides in pertinent part "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 ... may be a debtor under chapter 13 of this title." 11 U.S.C.

§ 109(e). Therefore, if a debtor's noncontingent, liquidated, unsecured debts are greater than $307,675.00 he is not eligible to be a debtor under chapter 13.

"[S]ection 109(e) provides that the eligibility computation is based on the date of the filing of the petition; it states nothing about computing eligibility after a hearing on the merits of the claim." In re Hutchens, 69 B.R. 806, 810 (Bankr. E.D. Tenn. 1987). Both the Revenue Department's claim and the Debtor's schedules list unsecured debt owed to the Revenue Department in excess of the $307,675.00 maximum for unsecured debts allowed under § 109(e). Arguing the Final Assessment is flawed does not remove it from consideration for Chapter 13 eligibility.

It is clear the Debtor's liability to the Revenue Department was both noncontingent and liquidated on December 2, 2004, the date this bankruptcy case was filed, notwithstanding the current dispute. The Final Assessment was entered on July 9, 2003 and affirmed by order of an administrative law judge on November 3, 2004. Thus, the liability represented a fixed, legal obligation of the debtor at the time of filing.

Therefore, this Court finds the debt owed to the Revenue Department is a liquidated, noncontingent, unsecured debt in excess of $307,675.00. Consequently, pursuant to the requirements of § 109(e), the Debtor is not eligible to be a debtor under Chapter 13 of the Bankruptcy Code and this case must be dismissed.

III. CONCLUSION

The Debtor's Objection essentially asks this federal Court to engage in appellate review of a determination made by an Alabama state court. However, under the *Rooker-Feldman* doctrine, this Court lacks jurisdiction to engage in appellate review of that decision. Further, because the Debtor's noncontingent, liquidated, unsecured debts exceed $307,675.00 he is not eligible to be a debtor under

Chapter 13 of the Bankruptcy Code. Accordingly it is hereby

ORDERED, ADJUDGED, AND DECREED that the *Objection to Claim* filed by the Debtor, Mike Maher Al-Sedah, is **OVERRULED.** Accordingly, the State of Alabama Department of Revenue's Proof of Claim for $516,101.46 is deemed **ALLOWED**.

It if further **ORDERED, ADJUDGED, AND DECREED** that because the Debtor, Mike Maher Al-Sedah, is not eligible to be a debtor under Chapter 13 of the Bankruptcy Code pursuant to 11 U.S.C. § 109(e) the Trustee's *Motion to Dismiss* is **GRANTED** and this case is **DISMISSED**.

Dated this the 19th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: Luther Abel, attorney for the Debtor
David Avery, III, attorney for the Claimant, the State of Alabama Department of Revenue
Linda B. Gore, Chapter 13 Standing Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	)	
	)	
MIKE MAHER AL-SEDAH,	)	**Case No. 04-44030**
	)	
Debtor.	)	

In re:	)	
	)	
MIKE MAHER AL-SEDAH,	)	
	)	
Debtor.	)	**Contested Matter**
vs.	)	
	)	
STATE OF ALABAMA	)	
DEPARTMENT OF REVENUE,	)	
	)	
Claimant.	)	

ORDER

In conformity with the Memorandum Opinion entered contemporaneously herewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the *Objection to Claim* filed by the Debtor, Mike Maher Al-Sedah, is **OVERRULED.** Accordingly, the State of Alabama Department of Revenue's Proof of Claim for $516,101.46 is deemed **ALLOWED**.

It if further **ORDERED, ADJUDGED, AND DECREED** that because the Debtor, Mike

Maher Al-Sedah, is not eligible to be a debtor under Chapter 13 of the Bankruptcy Code pursuant to 11 U.S.C. § 109(e) the Trustee's *Motion to Dismiss* is **GRANTED** and this case is **DISMISSED**.

Dated this the 19th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: Luther Abel, attorney for the Debtor
David Avery, III, attorney for the Claimant, the State of Alabama Department of Revenue
Linda B. Gore, Chapter 13 Standing Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JOHN THOMAS LONG,	)	**Case No. 04-02736-TOM-7**
	)	
Debtor.	)	

JOHN THOMAS LONG,	)	
	)	
Plaintiff	)	**A.P. No. 04-00111**
	)	
vs.	)	
	)	
SALLIE MAE SERVICING, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a trial on June 29, 2005, on the *Complaint to Determine Dischargeability* filed by the Plaintiff, John Thomas Long ("Mr. Long" or "Debtor"). Appearing at the trial were: David Murphree, attorney for Mr. Long; W. McCollum Halcomb, attorney for the Defendant, Education Credit Management Corporation ("ECMC"); Lisa Thigpen (via VTC), witness for ECMC; and Mr. Long. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is

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[1] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).[2] The Court has considered the pleadings, the arguments of counsel, the testimony, the evidence admitted and the law and finds and concludes as follows.[3]

I. FACTUAL BACKGROUND[4]

A. Education and Loan Information

Mr. Long graduated from the University of Alabama in 1981. In 1992, he began attending Jones School of Law ("Jones") in the evenings while continuing to work a full-time job. While

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28 U.S.C. § 157(a) provides:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2)(I) provides:

> (b)(2)Core proceedings include, but are not limited to–
>
> (I) determinations as to the dischargeability of particular debts;

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[4] Mr. Long and ECMC submitted a *Joint Stipulation of Facts* ("*Joint Stipulation*") prior to the trial. Some of the facts in this section are taken from that joint stipulation.

attending Jones he applied for a series of student loans and received $21,650.00 as proceeds of these loans. ECMC Exh. 5.

He graduated from Jones in 1995 and was admitted to the Alabama State Bar (the "State Bar") in April 1996. After graduation he requested and received numerous forbearances and/or deferments to delay repayment of his student loans. ECMC Exh. 7. On May 21, 1997, Mr. Long consolidated these loans and he made four $220.66 payments, all within a 3 month span in 1998. ECMC Exh. 6. No additional full or partial payments have been made since then, and in fact the loan was in forbearance or deferred status for a substantial portion of the time period between 1998 and 2005.

ECMC purchased the consolidated loan on August 6, 2004, from USA Funds. ECMC Exh. 2. The consolidated loan was in default at the time it was purchased by ECMC. The total amount owed on the consolidated loan held by ECMC as of June 24, 2005, was $55,778.28 with interest continuing to accrue at a rate of $10.16 per diem. ECMC Amended Exh. 1. ECMC is the type entity contemplated under 11 U.S.C. § 528(a)(8). See *Joint Stipulation* The consolidated loan is an education debt as contemplated under 11 U.S.C. § 523(a)(8). Id.

Four repayment plans were available to Mr. Long through the United States Department of Education's William D. Ford Federal Direct Loan Program ("Direct Loan"): Standard, Extended, Graduated and Income Contingent.[5] Participation in these repayment plans is voluntary. Based on

[5] Under the standard repayment plan, the borrower pays a fixed amount each month until his or her loans are paid in full. 34 C.F.R. § 685.208(b) (2005). Minimum monthly payments of at least $50.00 are required, and the borrower has up to 10 years to repay the loan(s). Id.

Under the extended repayment plan, the repayment period may be extended from 12 to 30 years depending on the total loan amount. 34 C.F.R. § 685.208(c) (2005). Like the standard repayment plan, this plan also requires minimum monthly payments of at least $50.00. Id.

a family size of two[6] and an annual income of $30,000.00, Mr. Long's monthly loan payment would range from $291.83 to $684.14 depending upon the repayment plan chosen. ECMC's Amended Exh. 19-2. Similarly, based on a family size of two and an annual income of $25,000.00, Mr. Long's monthly loan payment would range from $208.83 to $684.14 depending upon the repayment plan chosen. ECMC's Amended Exh. 19-3. Monthly loan payments based on other criteria (ie. different family size and income) can easily be calculated using Direct Loan's online repayment calculator. Mr. Long chose not to participate in any of the repayment plans offered by Direct Loan. Despite filing bankruptcy Mr. Long is still eligible to participate in one of these repayment plans.

B. Personal and Family

Mr. Long began using cocaine in 1998 after the death of his second wife. He remarried in 1999 and continued using cocaine with his third wife. His use of cocaine and alcohol dramatically

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Under the graduated repayment plan, monthly payments start out low and generally increase every two years. 34 C.F.R. § 685.208(d) (2005). The length of the repayment period depends upon the total loan amount. 34 C.F.R. § 685.208(d).

The Income Contingent Repayment Plan ("ICRP") is a program that the Department of Education created to resolve the problem of student loan payments that would force families and individuals into poverty. Payments under the ICRP are calculated based on the borrower's adjusted gross income, family size and the federal Poverty Guidelines promulgated by the U. S. Department of Health and Human Services. 34 C.F.R. § 685.208(f)(1) (2005); 34 C.F.R .§ 685.209 (2005). The borrower's payments may not exceed 20 % of his discretionary income, which is defined as the borrower's adjusted gross income minus the federal poverty level for the debtor's family size. 34 C.F.R. § 685.209 (2005). Thus, if the borrower's income is less than the poverty level, his student loan payment under the ICRP would be zero.

The repayment period under the ICRP is 25 years. 34 C.F.R. § 685.209(c)(4) (2005). At the end of that period, any remaining debt is cancelled, leaving the loan debtor with only a tax to be paid on the debt forgiveness income. Id.

[6] The Court considered only Mr. Long's minor son as a dependent when calculating monthly loan payments.

increased, and by November 2000 he was spending between $500.00 and $1,000.00 each week to support his drug habit. He traded his legal services and used nearly all of his income to pay for drugs and alcohol. During this time, he and his family moved frequently because he was unable to pay rent or utilities.

He was arrested for possession of crack cocaine in August 2000.[7] The State Bar was notified of his arrest and he placed himself on disability / inactive status with the State Bar. The State Bar required him to enter a 35-day drug rehabilitation program in November 2000. After being released from the program he joined an Alcoholics Anonymous support group and has been drug and alcohol free (with one minor relapse in 2001) since then. He regularly attends Alcoholics Anonymous meetings each week. He separated from his third wife and moved in for a while with his parents in Mountain Brook, Alabama after being released from treatment. He subsequently acquired his own place for himself and his two sons.

After a hearing before the State Bar in January 2002, his law license was returned to active status. He is now a mentor with the State Bar's Lawyer Assistance Program, a peer support network for lawyers suffering from drug or alcohol dependency.

Other than his on-going struggle with alcohol and drugs, Mr. Long is a healthy 48 year-old man. He has two sons (16 and 20) from his first marriage and both are fairly healthy, although they both recently suffered from staph infections. His youngest son was injured while playing football but the injury was not permanent. He has sole custody of his youngest son and receives no financial assistance from the boy's mother. His older son lives with him, is presently unemployed and does not contribute to the household finances. Mr. Long testified that he cannot afford health insurance

[7] Mr. Long also received a DUI during this time period.

for himself or either of his sons and has had to pay medical expenses out of pocket.[8]

C. Employment

Upon graduation from the University of Alabama in 1981 Mr. Long moved to Houston, Texas and worked as an insurance adjuster for American General Fire and Casualty earning between $28,000.00 and $30,000.00 per year. He was laid off from American General in 1985 and took a position as a claims adjuster with Continental Insurance Company the following year. While at Continental his salary increased from $30,000.00 to $35,000.00 per year, he had use of a company vehicle and he participated in the company's health and retirement programs. He was laid off from Continental in 1995 and was unemployed for several months until taking a position with Goldome Credit Corporation in Birmingham.[9]

After being admitted to the State Bar he was employed as an attorney with the Birmingham law firm of Patton & Veigas, P.C. ("Patton") from April 1996 until August 1996. While at Patton he received an annual salary of $20,000.00 plus a percentage of settlements. Unhappy with this arrangement, he left Patton in August 1996 with a number of case files. Patton sued him over the removal of these files and a settlement was ultimately reached.[10] Patton was listed on Schedule F as having a $12,500.00 unsecured claim. After leaving Patton, Mr. Long practiced law in Birmingham as a sole practitioner, although he was associated with other local attorneys from time

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[8] A number of the debts scheduled and discharged in this bankruptcy were medical related.

[9] It was unclear based on the testimony and evidence exactly when Mr. Long returned to Alabama. The Court assumes, however, it was prior to beginning law school at Jones.

[10] The details of the lawsuit and the terms of the settlement were not provided to the Court. Mr. Long paid Patton $20,000.00 in 1997 and continued paying Patton under the settlement agreement until 2004.

to time. He is unsure of his exact income during these years but testified his highest annual income during this period was between $30,000.00 and $35,000.00. While unable to practice law, Mr. Long worked briefly as a car salesman for Serra Automotive from March 2001 until January 2002.

Since his reinstatement to the State Bar in 2002, Mr. Long has focused his practice mainly on criminal defense, personal injury and domestic relations. Nearly one-half of his personal injury cases are on a contingency basis. In non-contingency cases his billable hourly rate is $150.00. In such cases he takes a retainer or accepts payments but generally collects only 60% to 70% of his fees. He testified that he cannot afford to advertise in the yellow pages and relies mostly on word of mouth for new business. He currently has 30 to 35 active cases, mostly automobile accidents, with estimated fees of $2,000.00 to $4,000.00 each. He does not carry, nor has he sought, malpractice insurance, thus making him ineligible for client referrals from the Birmingham Bar. He said he assumed such insurance would be prohibitively expensive and therefore has not inquired about it.

D. Income and Expenses

Mr. Long's annual income varies depending upon which source you are relying. However, it is clear that his income has steadily increased since his reinstatement to the State Bar in 2002. He testified that his 2002 income was between $28,000.00 and $30,000.00.[11] According to his testimony his income increased the following year to $30,000.00 or $32,000.00.[12] Although his 2004 tax returns have not been filed, he estimates his income last year was between $34,000.00 and

[11] In 2002, his annual reported income for tax purposes was $18,874.00 ECMC Exh. 15-1. His Statement of Affairs also lists his 2002 income as $18,874.00. ECMC Exh. 12-1.

[12] In 2003, his annual reported income for tax purposes was $24,307.00. ECMC Exh. 16. His Statement of Financial Affairs estimated his 2003 annual income at $30,000.00. ECMC Exh. 12-1.

$35,000.00. He said his current financial situation is getting better and hopes to continue building his law practice.

Similarly, it is impossible to decipher Mr. Long's actual monthly expenses based on the evidence before the Court. In addition to Mr. Long's testimony, the Court reviewed Schedule J in his bankruptcy case and his responses to written interrogatories relating to his monthly expenses. ECMC Exh. 13 & 14.

According to Schedule J, Mr. Long's monthly expenses are $2,349.00.[13] However, based on his testimony and interrogatory responses his monthly expenses are more than $4,000.00.[14] ECMC Exh. 20. In many instances, Mr. Long provided three different expense amounts for the same service or expense category (ie. telephone, electricity, gas, recreation). The variation between these three amounts was often significant. Further, some expenses not listed at all on Schedule J were included in the interrogatory responses or in his testimony.

The following chart summarizes the expenses as listed on Schedule J:

[13] It should be noted that this amount does not include the monthly car payments and insurance on the vehicle Mr. Long purchased post-petition.

[14] It is impossible to calculate an exact amount of his monthly expenses based on his testimony and interrogatory responses. However, ECMC provided the Court with a comparison chart showing the difference in Schedule J expenses and expenses listed in his interrogatory responses. ECMC Exh. 20. Adding to the confusion was Mr. Long's testimony about his monthly expenses, much of which differed from both Schedule J and his interrogatory responses.

Monthly Expenses	**Schedule J Expenses**
Rent	$750.00
Power	$200.00
Water & Sewer	$25.00
Telephone	$80.00
Food	$500.00
Car Insurance	$84.00
Clothing	$100.00
Medical & dental expenses	$100.00
Recreation	$10.00
Transportation	$100.00
Regular expenses for operation of business	$400.00
Total Monthly Expenses	**2,349.00**

The total expenses listed on Schedule J are significantly less than the total expenses testified to at trial and included in written responses to interrogatories. For example, Schedule J lists monthly recreation expenses at $10.00. During trial, however, Mr. Long testified to spending $200.00 per month on recreation (including greens fees and dining out) and $65.00 per month for a YMCA membership. Monthly transportation expenses from Schedule J were listed as $100.00, but according to Mr. Long's testimony he spends $100.00 per month on oil changes and $275.00 per month on gasoline. Medical expenses of $100.00 per month were listed on Schedule J. At trial, Mr. Long testified that he spends $200.00 per month on medical expenses even though no one in his household has a chronic medical condition. Monthly telephone service was listed in Schedule J at

$80.00. At trial, Mr. Long said his monthly telephone bill was $30.00 and his cellular telephone bill was $94.00. Schedule J lists monthly clothing expenses as $100.00 but his interrogatory responses state he spend $300.00 per month on clothing.

A number of expenses Mr. Long testified about at trial or listed in written interrogatory responses were not listed on Schedule J, including monthly cable service of $45.00, monthly gas heat (winter only) of $300.00 to $400.00 and cellular telephone service of $94.00.

Finally, four days before filing this adversary proceeding seeking to discharge his student loan obligations (and three months after filing this case) Mr. Long purchased a used 2001 Honda Accord from Roebuck Honda in Gadsden for $23,300.00. ECMC Exh. 18. After making a cash down payment of $7,500.00, the total amount financed through Honda was $15,800.00 at an interest rate of 23.99%. Id. Monthly payments on the vehicle are $454.44. Id. His youngest son, who was 15 at the time, now drives his old vehicle, a 1995 Saturn. Because the Honda was purchased post-petition, car payments and insurance on the vehicle were not included on Mr. Long's Schedule J.

Mr. Long filed this Chapter 7 case on March 25, 2004 and subsequently filed this adversary proceeding on June 25, 2004 to determine the dischargeability of certain student loan obligations owed to ECMC.

II. CONCLUSIONS OF LAW

Congress' main purpose in enacting the Bankruptcy Code was to ensure the insolvent debtor a fresh start by discharging his prepetition debts. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). In furtherance of Congress' fresh start policy, the Eleventh Circuit has generally construed exceptions to discharge narrowly. Haas v. Internal Revenue Service (In re Haas), 48 F.3d 1153, 1158 (11th Cir. 1995); Equitable Bank v. Miller

(In re Miller), 39 F.3d 301, 304 (11th Cir. 1994). However, 11 U.S.C. § 523(a)(8) specifically provides that only in certain circumstances will education loans extended by or with the aid of a governmental unit or nonprofit institution solely on the basis of the student's future earnings potential be discharged in bankruptcy. Several reasons have been cited to explain why Congress excepted student loans from a discharge in bankruptcy. One source claims that it was in response to "the perceived need to rescue the student loan program from insolvency, and to also prevent abuse of the bankruptcy system by students who finance their higher education through the use of government backed loans, but then file bankruptcy petitions immediately upon graduation even though they may have or will soon obtain well-paying jobs, have few other debts, and have no real extenuating circumstances to justify discharging their educational debt." Green v. Sallie Mae (In re Green), 238 B.R. 727, 732-733 (Bankr. N.D. Ohio 1999) (citing the "Report of the Commission on the Bankruptcy Laws of the United States," H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., Pt. II 140, n.14). Another source claims that Congress enacted 11 U.S.C. § 523(a)(8) to ensure that these kinds of loans could not be discharged by recent graduates who would then pocket all future benefits derived from their education. Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738 (6th Cir. 1992) (citing H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 466-75 reprinted in 1978 U.S.C.C.A.N. 5787).

However, notwithstanding these policy concerns, Congress also realized that not all student debtors abused the bankruptcy system, and that some student debtors were truly in need of bankruptcy relief. Thus, Congress determined that an absolute bar to the dischargeability of student loan debts would be too harsh and also unnecessary to effectuate the foregoing policy goals. Consequently, unlike other types of debt, such as alimony and child support for which a debtor

cannot receive a bankruptcy discharge, Congress permitted student loan debts to be discharged if the debtor could demonstrate extenuating circumstances.

A. Dischargeability

A student loan is not dischargeable "unless excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents."[15] 11 U.S.C.§ 523(a)(8). The creditor bears the initial burden of both proving that a debt is owed and such debt is the type contemplated by § 523(a)(8). Roe v. The Law Unit, et al. (In re Roe), 226 B.R. 258, 268 (Bankr. N.D. Ala. 1998). Once proven, the burden shifts to the debtor to show that repayment of the debt would cause an undue hardship. Id. The appropriate standard of proof for § 523(a)(8) is a preponderance of the evidence. Grogan v. Garner, 498 U. S. 279, 290 (1991).

1. The Debt

Mr. Long acknowledged in the "Joint Stipulation of Facts" submitted to the Court that he owes the debt to ECMC, that ECMC is the type of entity contemplated by § 523(a)(8) and that the consolidated student loans are the type contemplated by § 523(a)(8). Therefore, the burden at trial was shifted to Mr. Long to prove that repayment of the debt would be an undue hardship on him and his dependents.

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[15] Section 523(a)(8) provides :

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

2. Undue Hardship

The Eleventh Circuit Court of Appeals recently adopted the three part test for proving "undue hardship" that was first articulated by the Second Circuit in Brunner v. New York State Higher Educ. Serv. Corp, 831 F.2d 395 (2d Cir. 1987). Hemar Ins. Corp. of Am. v. Cox (In re Cox), 338 F.3d 1238 (11th Cir. 2003). Quoting Brunner, the Eleventh Circuit stated that

> [to establish "undue hardship," the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Cox, 338 F.3d at 1241. This Court previously used the three part test established in Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. 532, 536-545 (Bankr. E.D. Pa. 1979) when determining undue hardship for student loan dischargeability. However, the Court now uses the Brunner test to conform with the Eleventh Circuit's holding in Cox.

I. First Brunner Factor

The first Brunner factor requires Mr. Long to prove that based on his current income and expenses he cannot maintain a "minimal" standard of living for himself and his minor son if he is forced to repay the student loans.[16] Courts have taken differing views about what constitutes a "minimal" standard of living. Few courts still use the United States Department of Health and Human Services Poverty Guidelines as a "bright line" determination of the minimal standard of

[16] The Court considered only Mr. Long's minor son as a dependent when calculating the poverty level based on family size.

living for student loan dischargeability purposes.[17] The Court does not believe that, in most cases, a debtor and his family living at or slightly above the federally defined poverty line is maintaining a "minimal" standard of living. Therefore, this Court rejects the notion that a debtor must fall below the federal poverty line to discharge a student loan.

This Court believes that a more thoughtful, analytical approach should be taken. A minimal standard of living lies somewhere between "poverty and mere difficulty." McLaney v. Kentucky Higher Educ.Assistance Authority (In re McLaney), 314 B.R. 228, 234 (Bankr. M.D. Ala. 2004). The court must examine the debtor's living situation to ensure that the debtor has no unnecessary and frivolous expenses; however, the debtor should not be forced to live in abject poverty with no comforts. Judge Benjamin Cohen best described a minimal standard of living as "a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." Ivory v. United States Dep't. of Educ. (In re Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). Judge Cohen went on to list numerous basic necessities needed to maintain a minimal standard of living:

> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.
> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.
> 3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
> 4. People need vehicles to go to work, to go to stores, and to go to doctors. They must

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[17] These guidelines define eligibility for certain government benefits and programs and are designed to assist the needy and economically disadvantaged. According to the 2005 Health and Human Services Poverty Guideline, the poverty level for a family of two is $12,830.00 per year. Federal Register, Vol. 70, No. 33, February 18, 2005, pp. 8373-8375, *available at* http://aspe.hhs.gov/poverty/05poverty.shtml (last visited July 14, 2005.)

> have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
> 5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
> 6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

Id. Brunner requires that this determination be based on the debtor's current income and expenses, thus the Court must look at the debtor's income and expenses at the time of trial. See Cox, 338 F.3d at 1241.

In this case it is difficult to determine Mr. Long's actual monthly expenses, his monthly income, or to do a simple comparison of his monthly income versus his monthly expenses to determine if he can maintain a minimal standard of living. However, based on the testimony and other evidence, Mr. Long appears to have made few, if any, financial sacrifices. He plays golf four times per month, he dines out regularly (including every day for lunch), he maintains his YMCA membership and he recently purchased a car even though no evidence was provided that his old car needed to be replaced.

This Court is generally reluctant to pick apart a debtor's schedules and testimony trying to squeeze every last dime from him. However, when a debtor seeks to discharge a substantial student loan debt while maintaining his prepetition spending habits, especially when no financial sacrifices are being implemented, the Court feels compelled to do so.

The Court finds that Mr. Long either overestimated some of his monthly expenses or he has no real knowledge of the actual amount and his "guesstimates" are inconsistent. For instance, $100.00 per month for oil changes and $275.00 for gasoline on two vehicles seems high given that

there was no testimony suggesting excessive driving or vehicle usage.[18] The Court also questions Mr. Long's recreation expenses. Based on his testimony he spends $200.00 on recreation (four rounds of golf and dining out) per month (up from $10.00 per month on Schedule J), $65.00 per month for a YMCA membership and $46.00 per month for cable television. The Court recognizes that "[p]eople must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet." Ivory, 269 B.R. at 899. However, Mr. Long may not argue that repayment of his student loan obligations will cause an undue hardship while at the same time spending over $300.00 per month on such "diversions."

The Court is also concerned with the amount Mr. Long spends dining out. He eats lunch out every day, costing him approximately $115.00 per month. His interrogatory responses indicate he spends $200.00 per month dining out.[19] Additionally, according to his testimony, a portion of his $200.00 "recreation" expense is also used for dining out. Clearly, Mr. Long spends a large portion of his monthly income dining out. In the Court's opinion, it is too high in light of his current circumstances and could be reduced.

Finally, three months after filing this case and only four days before filing this adversary proceeding, Mr. Long purchased a 2001 Honda Accord for $23,000.00 at an interest rate of 23.99% and monthly payment of $454.44. No evidence was presented showing that his previous vehicle, a

[18] Mr. Long testified that he changes the oil in his vehicles every 3,000 miles. Assuming an oil change costs $25.00, the estimated $100.00 would pay for four oil changes per month. At that rate, Mr. Long and his son would have to drive their two vehicles in excess of 12,000 miles per month to necessitate four oil changes.

[19] It is unclear whether the $115.00 for lunches is included in this $200.00.

1995 Saturn, needed to be replaced. In fact, his youngest son is now driving that vehicle.[20] Mr. Long could certainly have found a less expensive vehicle with a more reasonable monthly car payment and/or a lower interest rate or at least delayed purchasing a new vehicle until he was more financially stable. That Mr. Long felt it was reasonable to incur such a large debt while seeking to discharge his student loans seriously concerns the Court. While this Court recognizes the difficulty in financing a car purchase after bankruptcy, with a $7,500.00 cash down payment the Court believes he could have purchased something with a lower monthly payment.

The Court also finds that even if Mr. Long reduced each of his expenses by a little bit, there would be sufficient income to provide a standard of living that is better than minimal. Based on the foregoing, the Court believes Mr. Long can maintain a "minimal" standard of living for himself and his dependent son if forced to repay his student loan at this time. A number of Mr. Long's expenses are more than necessary and could be reduced in order to begin repayment of the student loan obligation.

Therefore, Mr. Long has failed to prove the first prong of the Brunner test. Because the first element of Brunner was not proven the student loan obligation may not be discharged. However, the Court will discuss the remaining two Brunner factors as they relate to this case.

ii. Second Brunner Factor

The second Brunner factor requires the debtor to show additional circumstances indicating that his or her state of affairs (that is, his inability to maintain a minimal standard of living if forced to repay the student loans) is "likely to persist for a significant portion of the repayment period."

[20] His son was more than six months from turning 16 years old when Mr. Long purchased the vehicle. In Alabama, one must be at least 16 years of age to receive a driver's license. Therefore, for at least six months Mr. Long had two vehicles for only one driver.

Brunner, 831 F.2d at 396. These circumstances must demonstrate a "certainty of hopelessness, not simply a present inability to fulfill financial commitment." Nys v. Educ. Credit Mgmt., Corp. (In re Nys), 308 B.R. 436, 443 (B.A.P. 9th Cir. 2004). See also Cox, 338 F.3d at 1242. While there is no definitive list of what are considered "additional circumstances," they may include:

> 1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement;
> 2. The debtor's obligations to care for dependents;
> 3. Lack of, or severely limited education;
> 4. Poor quality of education;
> 5. Lack of usable or marketable job skills;
> 6. Underemployment;
> 7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
> 8. Limited number of years remaining in work life to allow payment of the loan; Brunner,
> 9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
> 10. Lack of assets, whether or not exempt, which could be used to pay the loan;
> 11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
> 12. Lack of better financial options elsewhere.

In re Nys, 308 at 446-47 (internal citations omitted). Where the debtor is "apparently healthy, presumably intelligent and well-educated, and shows no evidence of extraordinary burdens which would impair further employment prospects" discharge of student loan obligations is inappropriate." Shankwiler v. Natl. Student Loan Marketing, et al. (In re Shankwiler), 288 B.R. 701, 706 (Bankr. C.D. Cal. 1997).

The Court must begin by noting its previous conclusion that Mr. Long does not have a present inability to fulfill his financial commitments, specifically his student loan obligation to ECMC and will be able to maintain a far more than minimal standard of living if forced to repay that obligation. His current financial condition is not dire and certainly permits him to begin repaying

his loan, especially in light of the various Direct Loan repayment plans available to him. However, the Court believes it is necessary to discuss the second Brunner factor in this case.

Mr. Long failed to establish any additional factors which suggest his financial condition is likely to continue for a significant portion of the repayment period. In fact, his financial situation has been improving and will likely continue to do so. He is a healthy, extremely well educated man[21] with a number of productive work years ahead of him. Other than his continuing battle with addiction he suffers from no other major medical conditions that are likely to affect his ability to hold a steady job, nor do either of his children suffer from major medical problems that require specialized care. He testified that his sons had recently been treated for staph infection and his youngest son was injured playing football and required medical treatment. Neither of these are ongoing medical conditions, though.

Mr. Long argues his addiction to drugs and alcohol should be considered by the Court as an "additional circumstance." However, a debtor's drug and/or alcohol addiction was not an "additional circumstance" contemplated by Congress when the Bankruptcy Code was drafted. See, e.g., Roach v. United Student Aid Fund (In re Roach), 288 B.R. 437, 446 (Bankr. E.D. La. 2003). While Mr. Long's former addiction is unfortunate, the possibility of relapse does not necessarily prevent him from obtaining employment or advancement. In fact, Mr. Long has successfully resumed the practice of law. This Court is confident that Mr. Long's participation in the State Bar's Lawyer's Assistance Program and Alcoholics Anonymous will assist in his continued sobriety.

Other factors suggest that Mr. Long's financial situation will continue to improve. Mr. Long

[21] Mr. Long held down a full-time job while attending law school and passed the Alabama State Bar examination which suggests that he is bright and capable of increasing and improving his law practice.

stated his financial situation had improved since his law license was reinstated but that rebuilding his law practice is a "slow process." His income has increased incrementally each year since he resumed practicing law in 2002. He estimates that he may earn $36,000 this year, an increase of nearly 25% from 2002. Additionally, Mr. Long's only minor child is now sixteen years old and in eighteen months will no longer be a dependent, further reducing his monthly expenses.

Mr. Long is not limited to a law practice, and his options are certainly enhanced by his education and work experience. He holds both a Bachelor's degree and a Juris Doctorate and prior to attending law school he had a successful career in the insurance industry earning the same, if not more, than he currently earns in addition to having medical and retirement benefits. This Court does not believe that he is "entitled to an undue-hardship discharge by virtue of selecting an education that failed to return economic rewards." Coveney v. Costep Servicing Agent, et al. (In re Coveney), 192 B.R. 140, 143 (Bankr. W.D. Tex. 1996)(citing Matter of Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993)).

Given a little more time and his expanding practice it is entirely possible that Mr. Long's practice will grow and flourish. Because Mr. Long has demonstrated no "additional, exceptional circumstances" that suggest his current financial situation will continue for a substantial portion of the repayment period he has failed to prove the second prong of the Brunner test. Because the second element of Brunner was not proven the student loan may not be discharged. However, in order to complete the nondischargeability analysis, the Court will examine the third Brunner prong.

iii. Third Brunner Factor

The third Brunner factor requires a showing that the debtor made a good faith effort to repay the student loans. Brunner, 831 F.2d at 396. What is considered a debtor's good faith effort varies

widely among courts; however, courts are generally reluctant to find good faith where a debtor made minimal or no payments on his or her student loans. See, e.g., Murphy v. CEO/Manager, Sallie Mae, et al. (In re Murphy), 305 B.R. 780 (Bankr. E.D. Va. 2004)(no good faith where the debtor made no payments on her student loans); Garrett v. New Hampshire Higher Educ. Assistance Found., et al. (In re Garrett), 180 B.R. 358, 364 (Bankr. D.N.H. 1995)(no good faith shown where "[t]he record is devoid of any payment made by [the debtor] on these loans or even any attempt to enter into a repayment schedule with [the lenders]"). Other factors to consider include the amount of the student loan debt as a percentage of the debtor's total indebtedness and whether the debtor attempted to find employment. See, e.g., Murphy, 305 B.R. at 798 (citing Hall v. U.S. Dep't. of Educ. (In re Hall), 293 B.R. 731, 737 (Bankr. N.D. Ohio 2002)(citations omitted).

Some courts also consider whether the debtor attempted to negotiate a repayment plan, or explored various repayment options such as the standard repayment plan, extended repayment plan, graduated repayment plan and income contingent repayment plan. See, e.g., Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 315 B.R. 554, 563 (B.A.P. 9th Cir. 2004): Cota v. U. S. Dept. of Educ. (In re Cota), 298 B.R. 408, 420 (Bankr. D. Ariz. 2003). A debtor's failure to take advantage of those repayment options is not per se indicative of bad faith, however. Cota, 298 B.R. at 420. The U.S. Department of Education's repayment plans may not be used as a sword to prevent dischargeability of student loans if the debtor chooses not to participate in them.

Since graduating from Jones Mr. Long has made four $220.66 payments towards his student loans, all within a three month period in 1998. He sought and was granted a number of forbearances and/or deferments between 1997 and 2003. Other than the four payments made in 1998, no additional full or partial payments have been made. While this alone may not indicate a lack of good

faith, given the totality of the circumstances the Court believes that Mr. Long has not demonstrated a good faith effort to repay his student loan obligations.

From August 1998 until November 1999, Mr. Long spent between $500.00 and $1,000.00 per week on drugs.[22] That money, or at least a portion of it, could have been used to begin repaying his student loan obligation to ECMC. While the Court sympathizes with Mr. Long's addiction and applauds his diligence in requesting numerous forbearances and deferments, his failure to repay the debt during those times when it appears he had the financial ability to do so cannot be overlooked simply because of his addiction. This Court is compelled to determine that a debtor who forbears a debt and uses money which otherwise could have gone to repay that debt to buy illegal drugs and alcohol demonstrates a lack of good faith to repay the debt.

More recently, Mr. Long made a $7,500.00 cash down payment on a 2001 Honda Accord. Despite having this much excess cash on hand, he chose not to send any of it to ECMC. Even sending a portion of that money to ECMC would have shown the Court Mr. Long was at least attempting to repay his student loan obligation, thus demonstrating a minimal level of good faith.

Further, Mr. Long knew or should have known of the various repayment programs offered by the Department of Education but chose not to explore them. That Mr. Long chose not to take advantage of one of these programs is not alone sufficient to demonstrate his lack of good faith. However, had he at least explored and considered the programs, even if he ultimately chose not to utilize them, the Court would find it easier to accept that his failure to pay was in good faith.

Finally, Mr. Long scheduled an unsecured student loan debt of $30,583.06 owed to ECMC.

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[22] The Court acknowledges the testimony about Mr. Long's struggles and tragedies in his personal life. However, while the Court is sympathetic, this does not change the Court's ultimate conclusion.

However, according to the "Stipulation of Facts" the total amount due on the student loan debt is $55,778.28. This student loan debt accounts for nearly 40% of the total debt he seeks to have discharged in his Chapter 7 bankruptcy.

Based on the foregoing, the Court finds that Mr. Long has not made a good faith effort to repay his student loan obligations and therefore has failed to prove the third prong of the Brunner test. Because the third Brunner element was not proven the student loan may not be discharged.

III. CONCLUSION

Discharge of student loan obligations should be limited to only exceptional cases. This is not such a case. Mr. Long failed to prove that he and/or his son will suffer undue hardship if he is forced to repay his student loan obligation to ECMC. Although he deserves credit for successfully overcoming both his addiction and tragedy in his personal life, the Court does not believe the facts of this case warrant a discharge of his student loan debt. Therefore, the Court finds that Mr. Long's consolidated student loan held by ECMC is not dischargeable under 11 U.S.C. § 523(a)(8). Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Debtor, John Long, to declare his student loan debt dischargeable pursuant to 11 U.S.C. § 523(a)(8) is **DENIED.** Accordingly, the balance of Mr. Long's consolidated student loan debt owed to the Defendant, Educational Credit Management Corporation, is hereby declared to be **NONDISCHARGEABLE**.

Dated this the 29th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: David Murphree, Attorney for the Plaintiff, John Long
W. McCollum Halcomb, Attorney for the Defendant, ECMC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JOHN THOMAS LONG,	)	**Case No. 04-02736-TOM-7**
	)	
Debtor.	)	

JOHN THOMAS LONG,	)	
	)	
Plaintiff	)	**A.P. No. 04-00111**
	)	
vs.	)	
	)	
SALLIE MAE SERVICING, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In conformity with the Memorandum Opinion entered contemporaneously herewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Debtor, John Long, to declare his student loan debt dischargeable pursuant to 11 U.S.C. § 523(a)(8) is **DENIED.** Accordingly, the balance of Mr. Long's student loan debt owed to Defendant, Educational Credit Management Corporation, is hereby declared to be **NONDISCHARGEABLE** and a judgment to that effect is hereby entered.

Dated this the 29th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: David Murphree, Attorney for the Plaintiff, John Long
W. McCollum Halcomb, Attorney for the Defendant, ECMC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
BLACK CREEK LAND &	)	**Chapter 7**
MINERAL, INC., et al.,	)	**Involuntary Petition**
	)	**Case No. 02-07208**
Debtors	)	
	)	**(Jointly Administered)**

THOMAS E. REYNOLDS,	)	
as Trustee of the Estate of	)	
BLACK CREEK LAND &	)	
MINERAL, Inc.,	)	
	)	
Plaintiff	)	
	)	**A.P. No. 04-159**
vs.	)	
	)	
DERRELL JUNIOR	)	
CHAMBLEE, SCOTTIE	)	
DERRELL CHAMBLEE &	)	
CHERYL CROWDER	)	
CHAMBLEE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a hearing on July 25, 2005, on the *Motion to Amend Complaint* ("*Motion to Amend*") filed by the Plaintiff, Thomas E. Reynolds, as Trustee for the Estate of Black Creek Land & Mineral, Inc. ("Trustee") and the *Objection to Trustee's Motion to Amend and Motion to Dismiss Plaintiff Trustee's Amended Complaint* ("*Objection and Motion to Dismiss*") filed by the Defendants Derrell Junior Chamblee and Scott Derrell Chamblee ("Defendants"). Appearing at the hearing were: Steven Ball, attorney for the

Trustee; Phillip Bates, attorney for the Defendants; Tom Corbett, Chief Deputy Bankruptcy Administrator; and Jon Dudeck, an attorney in the Bankruptcy Administrator's office. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).[2]

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[1] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157(a) provides:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. §§ 157(b)(2)(A) provides:

> (b)(2)Core proceedings include, but are not limited to–
>
> (A) matters concerning the administration of the estate;

The Trustee seeks to amend the original *Complaint* to clarify that this adversary proceeding was filed in his capacity as Trustee for all of the procedurally consolidated debtors, including Black Creek Land & Mineral, Inc. ("Black Creek"), Jefferson Screening, Inc. ("Jefferson Screening") and Laguna Resources, Inc. ("Laguna")(collectively the "Debtors"). He also seeks to add additional counts based on 11 U.S.C. § 548(a)(1)(A) and (B) and Ala. Code §§ 8-9A-4 and 5. The Defendants oppose the *Motion to Amend* on various grounds and, *inter alia*, request that the *Amended Complaint* be dismissed.[3]

The Court has considered the pleadings, the arguments of counsel and the law and finds and concludes as follows.[4]

I. FACTUAL BACKGROUND [5]

A. State Court Proceedings

In August 1998, Laguna sued Jefferson Screening in the Circuit Court of Walker County, Alabama.[6] Jefferson Screening filed suit as a third-party plaintiff against Seminole Electric

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[3] Since the Court had not yet granted the Trustee's Motion to Amend Complaint when the Defendants' Motion to Dismiss was filed there was technically no Amended Complaint to be dismissed. However, although the Defendants' Motion to Dismiss is procedurally premature, the Court will rule on it at this time to avoid any further delay in this litigation.

[4] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[5] Pursuant to Fed. R. Evid. 201, this Court may take judicial notice of the contents of its own files. See ITT Rayonier, Inc. v. U.S., 651 F.2d 343 (5th Cir. 1981).

[6] The facts underlying the Walker County litigation have been extensively recited in numerous pleadings and other papers filed in the main bankruptcy case during the past three years and are well know to all parties involved in the adversary proceeding. Therefore, the Court finds it unnecessary to recite those facts again.

Cooperative, Inc. ("Seminole") in September 1998. Black Creek was joined as an indispensable third-party Plaintiff in that action. In February 1999, Laguna amended its complaint, effectively absolving Jefferson Screening from wrongdoing and placing full blame on Seminole. The practical effect of this amendment was to align all of the Debtors against Seminole. The Defendants were principals in one or more of the Debtor companies throughout the course of the Walker County litigation.

Following prolonged litigation and a jury trial, a judgment for $21,789,557.00 in compensatory and punitive damages plus costs was entered on June 26, 2001, in favor of Jefferson Screening, the original third-party plaintiff, and against Seminole. The judgment also awarded compensatory damages $363,690.00 to Laguna and $43,652.69 to Black Creek. After numerous appeals and mediations, the Debtors and Seminole finally reached a settlement (the "Settlement") of the litigation. An interpleader complaint was filed and the Settlement funds were paid into the Walker County Circuit Court to be disbursed by the clerk of court.

The Walker County Circuit Court approved the Settlement in an Order entered on September 11, 2002 that, *inter alia*, instructed the clerk of court to pay Derrell Junior Chamblee and Scottie Derrell Chamblee $400,000.00 and $350,000.00 respectively as compensation for their assistance in the Walker County litigation.[7]

B. Bankruptcy Proceedings

On September 13, 2002, involuntary Chapter 7 bankruptcy petitions were filed against the

[7] All court records relating to the Walker County litigation were subsequently sealed pursuant to an Order entered by the Walker County Circuit Court on October 10, 2002.

Debtors.[8] On January 15, 2003, Orders for Relief were entered in each of the bankruptcy cases and Tom Reynolds was appointed as Trustee in each case.[9] The cases were procedurally consolidated for joint administration pursuant to Fed. R. Bankr. P. 1015(b) on March 7, 2003. The Order granting procedural consolidation and joint administration instructed that "the caption of these cases is modified to reflect the joint administration" and required the new caption to include the phrase "Jointly Administered" below the case number. Each of the Debtors and all of the creditors were served with this Order on March 9, 2003.

There was extensive litigation before this Court in the main bankruptcy case. Again, all of the parties to this adversary proceeding are well aware of what occurred in the main bankruptcy case. Therefore, the Court finds that a detailed recitation of that litigation is unnecessary here.

The Trustee filed this adversary proceeding on September 6, 2004. Proc. No. 1. Paragraph one of the *Complaint* provides: "The Plaintiff, Thomas E. Reynolds, (hereinafter the "Trustee") by and through counsel, brings this action in his capacity as Trustee for the Estate of Black Creek." Id. The caption of the *Complaint* includes the phrase, "Jointly Administered." The Trustee filed the Motion to Amend to, *inter alia*, clarify that the adversary proceeding is being pursued on behalf of all of the consolidated Debtors. Proc. No. 40. The *Motion to Amend* also sought to add additional counts to the *Complaint* based on 11 U.S.C. § 548(a)(1)(A) and (B) and Ala. Code §§ 8-9A-4 and 5. Id. In opposition the Defendants filed the *Objection and Motion to Dismiss*, the caption of which

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[8] The Laguna involuntary petition was filed in the United States Bankruptcy Court for the Northern District of Alabama, Western Division. The case was transferred to the Southern Division by agreement of the parties on October 22, 2002.

[9] Prior to the entry of orders for relief, Tom Reynolds had served as the Interim Trustee of the three bankruptcy estates pursuant to an Order of this Court entered on October 22, 2002.

reads, *inter alia*, "Bankruptcy Cases Nos.: 02-07208-TOM-7, 02-07209-TOM-7, AND 02-72819-7 [,] Jointly Administered." Proc. No. 46. The Defendants styled the adversary proceeding as "THOMAS E. REYNOLDS, as Trustee of the Estates of BLACK CREEK LAND & MINERAL, INC.[,] JEFFERSON SCREENING, INC. & LAGUNA RESOURCES, INC." Id. A *Response* was filed by the Trustee. Proc. No. 52.

II. CONCLUSIONS OF LAW

A. Amendments to Pleadings

Amendments to pleadings are governed by Rule 15 of the Federal Rules of Civil Procedure, made applicable to bankruptcy by Fed. R. Bankr. P. 7015, which provides, in pertinent part

> (a) Amendments.
>
> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires ...
>
> (c) Relation Back of Amendments.
>
> An amendment of a pleading relates back to the date of the original pleading when
>
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,

Fed. R. Civ. P. 15. Since the Defendants filed an Answer long before the Trustee sought to amend the Complaint, the Complaint may not be amended without leave of the Court.

Trial courts have broad discretion in determining whether to grant leave to amend a complaint. See Jameson v. The Arrow Company, 75 F.3d 1528, 1534-5 (11th Cir. 1996). The

purpose of Rule 15(a) is to "assist in the disposition of litigation on the merits of the case rather than have pleadings become an end in themselves." Summit Office Park, Inc. v. U.S. Steel Corp., 639 F.2d 1278, 1284 (5th Cir. 1981)(citations omitted). In determining whether to grant leave to amend a complaint, the United States Supreme Court wrote

> [i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103 (1957). The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' [Fed. R. Civ. P. 1].
>
> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded ... In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.- the leave sought should, as the rules require, be 'freely 'given.'

Foman v. Davis, 371 U.S. 178, 181-82 (1962). A complaint may be amended, even if the statute of limitations has run, when "what is involved is a mere change in the description of the capacity in which the plaintiff sues." Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968). The Longbottom court goes on to note that substantial authority exists "for even greater liberality of amendment than called for in this case, in the form of allowing substitution of a new plaintiff after the statute of limitations has run, with relation back, when the new and old parties are different but have substantial identity of interest." (citations omitted) Id. at n. 6.

1. Adding Laguna and Jefferson Screen

The first amendment to the Complaint sought by the Trustee is merely to clarify the capacity in which he is suing by adding the estates of Laguna and Jefferson Screen. There is no reason to

assume the Trustee's failure to state that he was acting in his capacity as Trustee for all three Debtors, rather than only one, was anything other than a clerical error. The Defendants knew the cases were procedurally consolidated in March 2003, and have been jointly administered for more than two years. The pleadings in the main case and in this adversary proceeding, including the Defendants' *Objection and Motion to Dismiss*, indicate that the cases are "Jointly Administered." Further, the *Objection and Motion to Dismiss* is styled, *inter alia*, as "THOMAS E. REYNOLDS, as Trustee of the Estates of BLACK CREEK LAND & MINERAL, INC.[,] JEFFERSON SCREENING, INC. & LAGUNA RESOURCES, INC." Given the history of this case and the Defendants' involvement in it, it is unreasonable to believe they thought the Trustee was acting on behalf of only one debtor when the three cases had been jointly administered for more than two years. As such, they should have known that the Trustee did not intentionally misplead the original Complaint.

The Defendants are playing a game of procedural gamesmanship in which the Trustee's simple clerical error would be a fatal misstep. Such a position is contrary to the spirit of the Federal Rules. This Court believes in trying cases, not lawyers. Additionally, this adversary proceeding is to bring to light any alleged misconduct or cause of action that will recover assets for the benefit of the creditors which is the compelling basis of bankruptcy. Therefore, to the extent the Trustee made a clerical mistake or oversight in pleading, or to the extent he merely seeks to clarify the pleadings, the Court will permit him to correct that mistake.

2. Adding additional claims

The Trustee also seeks to add additional counts to the original *Complaint* based on 11 U.S.C. § 548(a)(1)(A) and (B) and Ala. Code §§ 8-9A-4 and 5. These new claims will relate back to the

date of the original Complaint, and will not be potentially barred by the statute of limitations, if they "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c).

The original *Complaint* alleges the transfers of $350,000.00 and $400,000.00 to Derrell Junior Chamblee and Scottie Derrell Chamblee respectively are avoidable under 11 U.S.C. § 547, or alternatively under 11 U.S.C. § 549. Similarly, the Amended Complaint alleges that those transfers were fraudulent pursuant to 11 U.S.C. § 548(a)(1)(A) and (B) and ALA. CODE §§ 8-9A-4 and 5 and may be avoided. The claims asserted in the Amended Complaint clearly "arose out of the conduct, transaction, or occurrence set forth ... in the original pleading" and therefore relate back to the date of the original *Complaint*.

Accordingly, because the new claims relate back to the original pleading and are thus not time barred, leave is granted to amend the original *Complaint* to add the additional claims based on 11 U.S.C. § 548(a)(1)(A) and (B) and Ala. Code §§ 8-9A-4 and 5.

B. Motion to Dismiss

A court "may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint." Looney v. Hyundai Motor Mfg. Alabama, LLC, 330 F. Supp. 1289, 1290 (M.D. Ala. 2004). See also Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986). Factual allegations should be accepted as true and viewed in a light most favorable to the non-moving party. See Looney, 330 F. Supp. at 1290. The threshold for a complaint to survive a motion to dismiss for failure to state a claim is "exceedingly low." Id.

The Defendants seek to dismiss portions of the *Amended Complaint*, specifically those

dealing with 11 U.S.C. § 548(a)(1)(A) and (B) and Ala. Code §§ 8-9A-4 and 5.[10] The Defendants make several arguments in support of their *Objection and Motion to Dismiss*, including that the money was not property of the estate and that no creditors were harmed by the transfer.[11] These arguments go to the heart of the case and are not a proper basis for a *Motion to Dismiss*. Assuming the factual allegations in the *Amended Complaint* are true and considering them in a light most favorable to the Trustee, the Court finds that relief could be granted in the Trustee's favor. Therefore, based on the foregoing, the Defendants' *Objection and Motion to Dismiss* is denied.

III. CONCLUSION

Based on the evidence, the pleadings and the arguments of counsel, the Court finds that the Trustee should be granted leave to amend the *Complaint*. The Court further finds the dismissal of the Amended Complaint and the objection to amending the Complaint sought in the Defendants' *Objection and Motion to Dismiss* are due to be denied and overruled, respectively. Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought in the Trustee's *Motion to Amend Complaint* is **GRANTED**; it is further

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[10] The Court again notes that a portion of the Defendants' *Objection and Motion to Dismiss* was procedurally premature for the reasons set out in footnote 3 herein.

From the Defendants' pleading it is unclear precisely what relief is requested. One portion of the *Objection and Motion to Dismiss* requests the *Amended Complaint* be dismissed and another portion requests a dismissal of only those newly added portions. The Court assumes the Defendants misplead the relief requested and intended to request the latter.

[11] Relying on a Bankruptcy Court for the Southern District of New York decision, the Defendants contend that to be avoidable, the fraudulent transfer must have harmed at least one creditor. That is not, however, the law in the Eleventh Circuit. See, e.g., In re XYZ Options, Inc., 154 F.3d 1262 (11th Cir. 1998).

ORDERED, ADJUDGED, AND DECREED relief sought in the Defendants' *Objection to Trustee's Motion to Amend and Motion to Dismiss Plaintiff Trustee's Amended Complaint* is **DENIED**; it is further

ORDERED, ADJUDGED, AND DECREED that the discovery deadline is extended and the parties shall complete discovery on or before October 7, 2005. A status conference shall be held on this matter on October 3, 2005 at 10:30 a.m. in Courtroom Number 2 of the Robert S. Vance Federal Building, 1800 5th Avenue North, Birmingham, Alabama.

Dated this the 11th day of August, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: Steven Ball, Attorney for the Trustee, Thomas Reynolds
Phillip Bates, Attorney for the Defendants, Derrell Junior Chamblee and Scottie Derrell Chamblee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ARTHUR WAYNE ELLIS,	)	**Case No. 04-06834-TOM-7**
	)	
Debtor.	)	

ELEANOR M. TYSON,	)	
	)	
Plaintiff	)	**A.P. No. 04-00207**
	)	
vs.	)	
	)	
ARTHUR WAYNE ELLIS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a trial on July 18, 2005, on the *Complaint* filed by the Plaintiff, Eleanor M. Tyson ("Ms. Tyson" or "Plaintiff"). Appearing at the trial were: M. Scott Harwell, attorney for Ms. Tyson; Daisy Holder, attorney for the Debtor / Defendant, Arthur Wayne Ellis ("Mr. Ellis" or "Debtor"); Ms. Tyson; Mr. Ellis; Bennie Dixon, witness for Ms. Tyson; and James Williams, witness for Ms. Tyson. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I) and (J).[2]

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[1] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority

The Court has considered the pleadings, the arguments of counsel, the testimony, the evidence admitted and the law and finds and concludes as follows.[3]

I. FACTUAL BACKGROUND

Ms. Tyson and Mr. Ellis first met in the late-1970's or early-1980's while both were employed by the Birmingham Police Department ("BPD"), Mr. Ellis as a patrolman and Ms. Tyson in fingerprinting. They had a romantic relationship lasting four or five years. They rekindled their

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> conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.
>
> 28 U.S.C. § 157(a) provides:
>
> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> 28 U.S.C. § 1334(b) provides:
>
> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> The General Order of Reference as amended provides:
>
> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. §§ 157(b)(2)(I) and (J) provide:

> (b)(2)Core proceedings include, but are not limited to–
>
> (I) determinations as to the dischargeability of particular debts;
>
> (J) objections to discharge [.]

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

relationship in early 2003, and Mr. Ellis moved in with Ms. Tyson a short time later. Ms. Tyson testified that she did not know Mr. Ellis was married when their second relationship began in 2003 but discovered it soon thereafter and they continued living together until their relationship ended seven months later.

During that seven month period, Ms. Tyson allegedly paid numerous bills for Mr. Ellis including, *inter alia*, mortgage payments, utility bills and tuition for truck driving school. She also allegedly purchased numerous items for him including, *inter alia*, building supplies and clothing and gave him cash on several occasions. At trial, exhibits purporting to show these expenditures by Ms. Tyson were introduced.[4] She explained each exhibit's significance and the debt it allegedly evidenced. For each exhibit, Ms. Tyson's attorney asked if Mr. Ellis had promised to repay her. She answered "yes" each time. She said all of the expenditures were loans and she expected to be repaid by Mr. Ellis. She also testified she and Mr. Ellis reached an agreement under which he agreed to repay her all of the money loaned.

On only one occasion did Mr. Ellis sign a promissory note ("Note") to Ms. Tyson. Plaintiff's Exh. 3. Pursuant to the terms of that Note, which was executed on April 23, 2003, Mr. Ellis agreed to repay Ms. Tyson a total of $1,538.00 at $75.00 per week. Because Mr. Ellis was unemployed at the time, repayment was to begin one month after Mr. Ellis returned to work. Mr. Ellis testified that he intended to repay the debt evidenced by the Note when he signed it.

Mr. Ellis explained that while he was living with Ms. Tyson he traded mostly in cash and Ms. Tyson suggested she write checks to pay his bills and expenses because they would provide better

[4] The Plaintiff introduced more than thirty receipts, cancelled checks and other documents at trial.

receipts. Acknowledging he was a poor records keeper, he said that he accepted her offer but gave her cash to cover the checks written on his behalf.

Mr. Ellis testified that Ms. Tyson had discussed marriage on several occasions and offered to pay for him to divorce his wife. Ms. Tyson denied both allegations. The two did, however, attend counseling for their relationship. Ms. Tyson testified that Mr. Ellis initiated the counseling "to establish that she could trust him."

After the relationship ended, Ms. Tyson filed a *pro se* lawsuit against Mr. Ellis in Jefferson County District Court on March 3, 2004, alleging she was owed $9,815.59 for "Cash Loans, Rent, telephone bills, Electric (Power bill), building Supplies[,] Clothing, House payment, tuition, Driving School (Truck), Training program car salesman, Electrical repairs, repairman, Gas [and] misc."[5] Defendant's Exh. 2. Following a bench trial at which both parties were present, a judgment was entered in Ms. Tyson's favor for $9,011.41 on June 29, 2004.[6]

Mr. Ellis filed this individual no-asset Chapter 7 bankruptcy case on August 6, 2004 and included Ms. Tyson as an unsecured nonpriority creditor holding a claim of $9,012.00. On November 5, 2004, Ms. Tyson filed this adversary proceeding alleging the debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)[7] and also objecting to discharge pursuant to 11 U.S.C. §§

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[5] It is unclear whether Ms. Tyson later retained counsel in the state court action.

[6] Prior to the trial, counsel for both parties met with the Court and agreed that the state court judgment is res judicata as to the amount and validity of the debt owed and this adversary proceeding trial is to determine if the debt is dischargeable. Mr. Ellis continued to dispute owing the debt. However, this Court is barred by the *Rooker-Feldman* doctrine from reviewing the validity of the amount of the state court judgment.

[7] The Complaint does not indicate whether the Plaintiff is relying on 11 U.S.C. § 523(a)(2)(A), (B) or both.

727(a)(2)(A) & (B), 727(a)(3), 727(a)(4)(A) & (D) and 727(a)(5).

II. CONCLUSIONS OF LAW

The central goal of the bankruptcy system is to provide certain debtors with a "fresh start" in which to enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 LED.2d 755 (1991)(quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)). This opportunity for a completely unencumbered "fresh start" is limited, however, to only the "honest but unfortunate debtor." Id.

A. Denial of Discharge

The Bankruptcy Code requires that debtors receive a discharge unless one of the statutory exceptions found in 11 U.S.C. § 727 is proved. Denial of discharge is a harsh remedy, one that should be exercised only under extreme circumstances. To further the "fresh start" objective of the Bankruptcy Code, the statute should be strictly construed against the party objecting to discharge and in the light most favorable to the debtor. See Overly v. Guthrie (In re Guthrie), 265 B.R. 253, 263 (Bankr. M.D. Ala. 2001); Behrman Chiropractic Clinics, Inc. v. Johnson (In re Johnson), 189 B.R. 985, 992 (Bankr. N.D. Ala. 1995). The plaintiff has the burden of proof on a complaint objecting to discharge. Fed. R. Bankr. P. 4005.

Ms. Tyson contends that Mr. Ellis should be denied a discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) & (B), 727(a)(3), 727(a)(4)(A) & (D) and/or 727(a)(5).[8] However, the Court finds that

[8] In pertinent part, 11 U.S.C. § 727 provides:

> (a) The court shall grant the debtor a discharge, unless–
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred,

Ms. Tyson did not offer any testimony or evidence suggesting that Mr. Ellis made a false oath, withheld any information or lost any assets. Therefore, she provided insufficient evidence at trial to support a denial of discharge under §§ 727(a)(4)(A) or (D) or 727 (a)(5), therefore the Court will not further examine whether discharge should be denied under those sections. The Court is left only to determine in detail whether denial of discharge is proper under §§ 727(a)(2)(A) or (B) or 727(a)(3).

1. Section 727(a)(2)(A) & (B)

Section 727(a)(2) of the Bankruptcy Code is intended to prevent the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. Specifically, § 727(a)(2)(A) provides that discharge should be denied to a debtor who, within one year of filing, destroys or conceals his or her assets that may otherwise have been available to satisfy creditors' claims. 11 U.S.C. § 727(a)(2)(A). Similarly, § 727(a)(2)(B) provides that discharge

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> removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> (3) the debtor has concealed destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; [or]
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account; ...
>
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet debtor's liabilities.

should be denied to a debtor who, after filing, destroys or conceals assets of the estate that may otherwise have been available to satisfy creditors' claims. 11 U.S.C. § 727(a)(2)(B).

After reviewing the record, the pleadings and the trial testimony, the Court is unable to determine what, if any, property Mr. Ellis allegedly concealed or destroyed. There is no evidence of depleted bank accounts, property transfers or the like. Further, neither Ms. Tyson nor Mr. Ellis testified about concealment or transfer of any property.

Based on the foregoing, the Court finds that Ms. Tyson did not prove that Mr. Ellis concealed or otherwise disposed of his assets or assets of the estate. Thus, she failed to satisfy her burden of proof under this section. Accordingly, the Court overrules Ms. Tyson's objection to the Debtor's discharge under 11 U.S.C. § 727(a)(2)(A) or (B).

2. Section 727(a)(3)

Section 727(a)(3) is intended to prevent the discharge of a debtor who fails to maintain or preserve books or records. The application of §727(a)(3) requires a two-tiered analysis. First, the court must determine whether the debtor has maintained adequate books and records from which his or her "financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3). Second, if the debtor failed to maintain adequate records the court must determine whether such failure was "justified under all of the circumstances of the case." Id.

The initial burden of proof is on the plaintiff to show that the debtor does not have sufficient books and records from which to satisfactorily ascertain the debtor's financial situation and business transactions. See Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984). Once proven, the burden shifts to the debtor to explain the lack of financial records in a satisfactory manner. Id. The explanation must consist of more than just the debtor's assertion that the records

no longer exist or are no longer available. Christy, et al. v. Kowalski (In re Kowalski), 316 B.R. 596 (Bankr. E.D.N.Y. 2004).

The record keeping requirement of § 727(a)(3) has been broadly construed. The debtor is not required to maintain an impeccable system of bookkeeping; rather, a debtor may satisfy the requirement if "the books and records are kept ... so as to reflect, with a fair degree of accuracy, the debtor's financial condition and in a manner appropriate to his business." Emerson v. Stephenson (In re Emerson), 244 B.R. 1, 25 (Bankr. D.N.H. 1999)(citations omitted). See also Turner v. Tran (In re Tran), 297 B.R. 817, 835 (Bankr. N.D. Fla. 2003); Phillips v. Nipper (In re Nipper), 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995)(a full accounting of every transaction is not required so long as the debtor maintains "some written records from which present and past financial condition of debtor may be ascertained with substantial completeness and accuracy.").

Ms. Tyson failed to satisfy the initial burden of proof that Mr. Ellis did not maintain adequate records from which his financial condition could be ascertained. She did not state what specific financial records Mr. Ellis failed to maintain or what additional records may be necessary to adequately assess his finances, and the Court will not guess as to what those records may be.

The only trial testimony concerning Mr. Ellis's financial records, or lack thereof, concerned his failure to maintain written receipts of cash payments he allegedly made to Ms. Tyson and mortgage payments he made to Washington Mutual. Whether or not he kept these records is insufficient as they would provide no additional insight into his overall financial condition. Further, there is no evidence that Ms. Tyson ever requested additional financial information from Mr. Ellis. Finally, no evidence was presented showing Mr. Ellis destroyed, concealed or mutilated any of his financial records.

Mr. Ellis is an individual debtor whose financial situation is not extremely complex. Like the vast majority of debtors before this Court, he was a poor record keeper, traded mostly in cash and rarely kept receipts as proof of payments made. However, simply being a poor record keeper does not warrant denial of discharge under § 727(a)(3). While his financial records may not be impeccable, the Court is satisfied that they are sufficient in this case.

Based on the foregoing, the Court finds that Ms. Tyson did not prove Mr. Ellis concealed, destroyed or failed to adequately maintain his financial records. Thus, she failed to meet her initial burden of proof under this section. Accordingly, the Court overrules Ms. Tyson's objection to the Debtor's discharge under 11 U.S.C. § 727(a)(3).

B. Dischargeability of the Debt

Section 523 of the Bankruptcy Code outlines exceptions to discharge in bankruptcy proceedings. Exceptions to discharge are to be construed strictly against the objecting creditor in order to give effect to the fresh start policy of the Bankruptcy Code. See Hope v. Walker (In re Walker), 48 F.3d 1161 (11th Cir. 1995). A creditor seeking to except a debt from discharge bears the burden of proof as to each particular element of nondischargeability by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 LED.2d 755 (1991). Ms. Tyson contends that the debt owed to her is nondischargeable under 11 U.S.C. §§ 523(a)(2).[9] She did not,

[9] In pertinent part, 11 U.S.C. § 523 provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> (B) use of a statement in writing--

however, specify upon which subparagraph of § 523(a)(2) she was relying. Therefore, the Court must examine non-dischargeability under both subparagraphs.

1. Section 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt for money, property, services, or an extension, renewal, or refinancing of credit will not be discharged to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). The elements that the plaintiff must establish for a determination of nondischargeability under this section include: 1) the debtor received or obtained money or property from the plaintiff, which creates a debt or obligation to the plaintiff; 2) the money or property was obtained and the debt incurred by either false pretenses, a false representation, or actual fraud; 3) the false pretense, false representation, or actual fraud was done by the debtor either knowingly or with reckless disregard of the truth; 4) the debtor's conduct was with the intention to deceive, with the intention that the plaintiff detrimentally rely, or with the intention that the plaintiff be given a false impression; 5) the plaintiff justifiably relied on the debtor's conduct or misrepresentation; and 6) the plaintiff suffered damages as a result of the debtor's actions. SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998).

The first element requires a finding that Mr. Ellis received money or property, thereby creating an obligation to Ms. Tyson. Based on the state court judgment, the testimony and the

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> (I) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive;

evidence, the Court finds Mr. Ellis received money from Ms. Tyson thereby creating an obligation to her. Therefore, the first element of the § 523(a)(2)(A) was met.

The second element requires a finding that the debt was incurred through false pretenses, a false representation or actual fraud. Because false pretenses, false representation and actual fraud are placed in the disjunctive, Congress intended that any one of these is sufficient to establish nondischargeability under § 523(a)(2)(A).

I. False Pretenses

The Court will first address whether Mr. Ellis incurred the debt by false pretenses. Judge Benjamin Cohen has defined the requirements for false pretenses:

> The concept of "false pretenses" is especially broad. It includes any intentional fraud or deceit practiced by whatever method in whatever manner. False pretenses "may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol or token calculated and intended to deceive."

FCC National Bank v. Gilmore (In re Gilmore), 221 B.R. 864, 872 (Bankr. N.D. Ala. 1998) (quoting BLACK'S LAW DICTIONARY 602 (6th ed. 1990)). False pretenses have also described as "a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully induced by a debtor to transfer property or extend credit to the debtor." Sterna v. Paneras (In re Paneras), 195 B.R. 395, 406 (Bankr. N.D. Ill. 1996).

Ms. Tyson testified that she knew Mr. Ellis was between jobs. She also had to know he was considering a new field of employment because he was attending truck driving school. No facts or circumstances were created or manufactured to induce her to loan money. There is no evidence that Ms. Tyson was wrongly induced into making expenditures on Mr. Ellis's behalf nor does the

evidence show that Mr. Ellis's actions were calculated to deceive Ms. Tyson. Even if Mr. Ellis promised to repay her as Ms. Tyson claims, no evidence was offered showing those promises were made in an effort to wrongfully induce her into giving him money.[10] For the foregoing reason, the Court finds that Mr. Ellis's debt to Ms. Tyson was not incurred through false pretenses.

ii. False Representation

The Court will now consider whether Mr. Ellis incurred the debt through a false representation. While a false pretense generally pertains to implied misrepresentations or conduct creating a false impression, "false representation involves an expressed misrepresentation by a debtor." Castro v. Zeller (In re Zeller), 242 B.R. 84, 87 (Bankr. S.D. Fla.1999). The First Circuit Court of Appeals has further defined the requirements for a false representation:

> If, at the time he made his promise, the debtor did not *intend to perform*, then he has made a false representation (false as to his intent) and the debt that arose as a result thereof is not dischargeable (if the other elements of §523(a)(2)(A) are met). If he did so intend at the time he made his promise, but subsequently decided that he could not or would not so perform, then his initial representation was not false when made.

Palmacci v. Umpierrez, 121 F.3d 781, 787 (1st Cir. 1997).

Ms. Tyson appears to argue that Mr. Ellis's verbal promises to repay constitute false representations. However, she offered no evidence, other than that they were not repaid, that the promises were made without the intent to perform. Failure to repay a debt does not by itself prove false representation by a debtor. The only written promise to pay is the Note, and according to Mr.

[10] Despite the state court judgment and a stipulation prior to trial as to the amount of the debt, Mr. Ellis continued to dispute that he promised to repay Ms. Tyson most of the money other than what was evidenced by the Note.

Ellis's trial testimony, he intended to repay the debt evidenced by the Note when he signed it.[11] Because he intended to perform when he signed the Note it may not be construed as a false representation.

Therefore, based on the foregoing, the Court finds that Mr. Ellis's debt was not incurred through false representation.

iii. Actual Fraud

Finally, the Court will consider whether Mr. Ellis incurred the debt through actual fraud. The Eleventh Circuit Court of Appeals has determined the elements of actual fraud to be that "(1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998). See also Field v. Mans, 516 U.S. 59, 73-75, 116 S.Ct. 437, 445-446 (1995) (holding that section 523(a)(2)(A) requires justifiable, but not reasonable, reliance).

As explained above, there is no evidence that Mr. Ellis made any false representations, either verbal or written, with the intent to deceive Ms. Tyson. Because a false representation is an element of actual fraud, and that element cannot be proven, the Court finds that the debt was not incurred through actual fraud.

Based on the foregoing, the Court finds Ms. Tyson failed to meet the second required element for nondischargeablity under 11 U.S.C. § 523(a)(2)(A), and thus the Court need not discuss the remaining issues.

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[11] The Plaintiff introduced inconsistent testimony from Mr. Ellis's deposition on this matter. The Court has weighed the evidence and Mr. Ellis's demeanor while testifying and believes Mr. Ellis's trial testimony was truthful.

2.Section 523(a)(2)(B)

Section 523(a)(2)(B) of the Bankruptcy Code provides that a debt for money, property, services, or an extension, renewal, or refinancing of credit may be excepted from discharge to the extent it was 1) obtained through the use of a written statement that is that is materially false, 2) respecting the debtor's or an insider's financial condition, 3) on which the creditor reasonably relied and 4) that the debtor caused to be made or published with intent to deceive. 11 U.S.C. § 523(a)(2)(B).

The first element of this section requires proof that Mr. Ellis received money based on a materially false written statement. The only written statement executed by Mr. Ellis and introduced at trial was the Note. Based on his trial testimony, Mr. Ellis intended to repay the debt when the Note was executed. Therefore, the Note is not a materially false written statement. Because the Note is not a materially false written statement, and no other written statements were introduced into evidence, it is impossible for Ms. Tyson to satisfy the first element of 523(a)(2)(B).

Therefore, based on the foregoing, the Court finds Ms. Tyson failed to meet the required elements for nondischargeablity under 11 U.S.C. § 523(a)(2)(B).

III. CONCLUSION

Based on the evidence and testimony in this case, the Court finds that Ms. Tyson has failed to prove by a preponderance of the evidence that the debt owed to her by Mr. Ellis should be declared nondischargeable under 11 U.S.C. § 523(a)(2)(A) or (B). The Court further finds that Ms. Tyson has failed to prove by a preponderance of the evidence that Mr. Ellis should be denied a discharge under 11 U.S.C. §§ 727(a)(2)(A) or (B), 727(a)(3), 727(a)(4)(A) or (B), or 727(a)(5). Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Plaintiff, Eleanor M. Tyson, to declare certain indebtedness of the Debtor, Arthur Ellis, nondischargeable in accordance with 11 U.S.C. §§ 523(a)(2) is **DENIED**. It is further

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Plaintiff, Eleanor M. Tyson, to deny discharge to the Debtor, Arthur Ellis, in accordance with 11 U.S.C. §§ 727(a)(2)(A) or (B), 727(a)(3), 727(a)(4)(A) or (B), or 727(a)(5) is **DENIED**. It is further

ORDERED, ADJUDGED, AND DECREED that the indebtedness of the Debtor, Arthur Ellis, to the Plaintiff, Eleanor Tyson, is **DISCHARGEABLE** and shall be included in the discharge of the Debtor to be entered in this case by order of this Court.

Dated this the 4th day of August, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: M. Scott Harwell, Attorney for the Plaintiff, Eleanor Tyson
Daisy Holder, Attorney for the Debtor / Defendant, Arthur Ellis

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JOHN THOMAS LONG,	)	**Case No. 04-02736-TOM-7**
	)	
Debtor.	)	

JOHN THOMAS LONG,	)	
	)	
Plaintiff	)	**A.P. No. 04-00111**
	)	
vs.	)	
	)	
SALLIE MAE SERVICING, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a trial on June 29, 2005, on the *Complaint to Determine Dischargeability* filed by the Plaintiff, John Thomas Long ("Mr. Long" or "Debtor"). Appearing at the trial were: David Murphree, attorney for Mr. Long; W. McCollum Halcomb, attorney for the Defendant, Education Credit Management Corporation ("ECMC"); Lisa Thigpen (via VTC), witness for ECMC; and Mr. Long. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is

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[1] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).[2] The Court has considered the pleadings, the arguments of counsel, the testimony, the evidence admitted and the law and finds and concludes as follows.[3]

I. FACTUAL BACKGROUND[4]

A. Education and Loan Information

Mr. Long graduated from the University of Alabama in 1981. In 1992, he began attending Jones School of Law ("Jones") in the evenings while continuing to work a full-time job. While

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28 U.S.C. § 157(a) provides:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2)(I) provides:

> (b)(2)Core proceedings include, but are not limited to–
>
> (I) determinations as to the dischargeability of particular debts;

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[4] Mr. Long and ECMC submitted a *Joint Stipulation of Facts* ("*Joint Stipulation*") prior to the trial. Some of the facts in this section are taken from that joint stipulation.

attending Jones he applied for a series of student loans and received $21,650.00 as proceeds of these loans. ECMC Exh. 5.

He graduated from Jones in 1995 and was admitted to the Alabama State Bar (the "State Bar") in April 1996. After graduation he requested and received numerous forbearances and/or deferments to delay repayment of his student loans. ECMC Exh. 7. On May 21, 1997, Mr. Long consolidated these loans and he made four $220.66 payments, all within a 3 month span in 1998. ECMC Exh. 6. No additional full or partial payments have been made since then, and in fact the loan was in forbearance or deferred status for a substantial portion of the time period between 1998 and 2005.

ECMC purchased the consolidated loan on August 6, 2004, from USA Funds. ECMC Exh. 2. The consolidated loan was in default at the time it was purchased by ECMC. The total amount owed on the consolidated loan held by ECMC as of June 24, 2005, was $55,778.28 with interest continuing to accrue at a rate of $10.16 per diem. ECMC Amended Exh. 1. ECMC is the type entity contemplated under 11 U.S.C. § 528(a)(8). See *Joint Stipulation* The consolidated loan is an education debt as contemplated under 11 U.S.C. § 523(a)(8). Id.

Four repayment plans were available to Mr. Long through the United States Department of Education's William D. Ford Federal Direct Loan Program ("Direct Loan"): Standard, Extended, Graduated and Income Contingent.[5] Participation in these repayment plans is voluntary. Based on

[5] Under the standard repayment plan, the borrower pays a fixed amount each month until his or her loans are paid in full. 34 C.F.R. § 685.208(b) (2005). Minimum monthly payments of at least $50.00 are required, and the borrower has up to 10 years to repay the loan(s). Id.

Under the extended repayment plan, the repayment period may be extended from 12 to 30 years depending on the total loan amount. 34 C.F.R. § 685.208(c) (2005). Like the standard repayment plan, this plan also requires minimum monthly payments of at least $50.00. Id.

a family size of two[6] and an annual income of $30,000.00, Mr. Long's monthly loan payment would range from $291.83 to $684.14 depending upon the repayment plan chosen. ECMC's Amended Exh. 19-2. Similarly, based on a family size of two and an annual income of $25,000.00, Mr. Long's monthly loan payment would range from $208.83 to $684.14 depending upon the repayment plan chosen. ECMC's Amended Exh. 19-3. Monthly loan payments based on other criteria (ie. different family size and income) can easily be calculated using Direct Loan's online repayment calculator. Mr. Long chose not to participate in any of the repayment plans offered by Direct Loan. Despite filing bankruptcy Mr. Long is still eligible to participate in one of these repayment plans.

B. Personal and Family

Mr. Long began using cocaine in 1998 after the death of his second wife. He remarried in 1999 and continued using cocaine with his third wife. His use of cocaine and alcohol dramatically

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Under the graduated repayment plan, monthly payments start out low and generally increase every two years. 34 C.F.R. § 685.208(d) (2005). The length of the repayment period depends upon the total loan amount. 34 C.F.R. § 685.208(d).

The Income Contingent Repayment Plan ("ICRP") is a program that the Department of Education created to resolve the problem of student loan payments that would force families and individuals into poverty. Payments under the ICRP are calculated based on the borrower's adjusted gross income, family size and the federal Poverty Guidelines promulgated by the U. S. Department of Health and Human Services. 34 C.F.R. § 685.208(f)(1) (2005); 34 C.F.R .§ 685.209 (2005). The borrower's payments may not exceed 20 % of his discretionary income, which is defined as the borrower's adjusted gross income minus the federal poverty level for the debtor's family size. 34 C.F.R. § 685.209 (2005). Thus, if the borrower's income is less than the poverty level, his student loan payment under the ICRP would be zero.

The repayment period under the ICRP is 25 years. 34 C.F.R. § 685.209(c)(4) (2005). At the end of that period, any remaining debt is cancelled, leaving the loan debtor with only a tax to be paid on the debt forgiveness income. Id.

[6] The Court considered only Mr. Long's minor son as a dependent when calculating monthly loan payments.

increased, and by November 2000 he was spending between $500.00 and $1,000.00 each week to support his drug habit. He traded his legal services and used nearly all of his income to pay for drugs and alcohol. During this time, he and his family moved frequently because he was unable to pay rent or utilities.

He was arrested for possession of crack cocaine in August 2000.[7] The State Bar was notified of his arrest and he placed himself on disability / inactive status with the State Bar. The State Bar required him to enter a 35-day drug rehabilitation program in November 2000. After being released from the program he joined an Alcoholics Anonymous support group and has been drug and alcohol free (with one minor relapse in 2001) since then. He regularly attends Alcoholics Anonymous meetings each week. He separated from his third wife and moved in for a while with his parents in Mountain Brook, Alabama after being released from treatment. He subsequently acquired his own place for himself and his two sons.

After a hearing before the State Bar in January 2002, his law license was returned to active status. He is now a mentor with the State Bar's Lawyer Assistance Program, a peer support network for lawyers suffering from drug or alcohol dependency.

Other than his on-going struggle with alcohol and drugs, Mr. Long is a healthy 48 year-old man. He has two sons (16 and 20) from his first marriage and both are fairly healthy, although they both recently suffered from staph infections. His youngest son was injured while playing football but the injury was not permanent. He has sole custody of his youngest son and receives no financial assistance from the boy's mother. His older son lives with him, is presently unemployed and does not contribute to the household finances. Mr. Long testified that he cannot afford health insurance

[7] Mr. Long also received a DUI during this time period.

for himself or either of his sons and has had to pay medical expenses out of pocket.[8]

C. Employment

Upon graduation from the University of Alabama in 1981 Mr. Long moved to Houston, Texas and worked as an insurance adjuster for American General Fire and Casualty earning between $28,000.00 and $30,000.00 per year. He was laid off from American General in 1985 and took a position as a claims adjuster with Continental Insurance Company the following year. While at Continental his salary increased from $30,000.00 to $35,000.00 per year, he had use of a company vehicle and he participated in the company's health and retirement programs. He was laid off from Continental in 1995 and was unemployed for several months until taking a position with Goldome Credit Corporation in Birmingham.[9]

After being admitted to the State Bar he was employed as an attorney with the Birmingham law firm of Patton & Veigas, P.C. ("Patton") from April 1996 until August 1996. While at Patton he received an annual salary of $20,000.00 plus a percentage of settlements. Unhappy with this arrangement, he left Patton in August 1996 with a number of case files. Patton sued him over the removal of these files and a settlement was ultimately reached.[10] Patton was listed on Schedule F as having a $12,500.00 unsecured claim. After leaving Patton, Mr. Long practiced law in Birmingham as a sole practitioner, although he was associated with other local attorneys from time

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[8] A number of the debts scheduled and discharged in this bankruptcy were medical related.

[9] It was unclear based on the testimony and evidence exactly when Mr. Long returned to Alabama. The Court assumes, however, it was prior to beginning law school at Jones.

[10] The details of the lawsuit and the terms of the settlement were not provided to the Court. Mr. Long paid Patton $20,000.00 in 1997 and continued paying Patton under the settlement agreement until 2004.

to time. He is unsure of his exact income during these years but testified his highest annual income during this period was between $30,000.00 and $35,000.00. While unable to practice law, Mr. Long worked briefly as a car salesman for Serra Automotive from March 2001 until January 2002.

Since his reinstatement to the State Bar in 2002, Mr. Long has focused his practice mainly on criminal defense, personal injury and domestic relations. Nearly one-half of his personal injury cases are on a contingency basis. In non-contingency cases his billable hourly rate is $150.00. In such cases he takes a retainer or accepts payments but generally collects only 60% to 70% of his fees. He testified that he cannot afford to advertise in the yellow pages and relies mostly on word of mouth for new business. He currently has 30 to 35 active cases, mostly automobile accidents, with estimated fees of $2,000.00 to $4,000.00 each. He does not carry, nor has he sought, malpractice insurance, thus making him ineligible for client referrals from the Birmingham Bar. He said he assumed such insurance would be prohibitively expensive and therefore has not inquired about it.

D. Income and Expenses

Mr. Long's annual income varies depending upon which source you are relying. However, it is clear that his income has steadily increased since his reinstatement to the State Bar in 2002. He testified that his 2002 income was between $28,000.00 and $30,000.00.[11] According to his testimony his income increased the following year to $30,000.00 or $32,000.00.[12] Although his 2004 tax returns have not been filed, he estimates his income last year was between $34,000.00 and

[11] In 2002, his annual reported income for tax purposes was $18,874.00 ECMC Exh. 15-1. His Statement of Affairs also lists his 2002 income as $18,874.00. ECMC Exh. 12-1.

[12] In 2003, his annual reported income for tax purposes was $24,307.00. ECMC Exh. 16. His Statement of Financial Affairs estimated his 2003 annual income at $30,000.00. ECMC Exh. 12-1.

$35,000.00. He said his current financial situation is getting better and hopes to continue building his law practice.

Similarly, it is impossible to decipher Mr. Long's actual monthly expenses based on the evidence before the Court. In addition to Mr. Long's testimony, the Court reviewed Schedule J in his bankruptcy case and his responses to written interrogatories relating to his monthly expenses. ECMC Exh. 13 & 14.

According to Schedule J, Mr. Long's monthly expenses are $2,349.00.[13] However, based on his testimony and interrogatory responses his monthly expenses are more than $4,000.00.[14] ECMC Exh. 20. In many instances, Mr. Long provided three different expense amounts for the same service or expense category (ie. telephone, electricity, gas, recreation). The variation between these three amounts was often significant. Further, some expenses not listed at all on Schedule J were included in the interrogatory responses or in his testimony.

The following chart summarizes the expenses as listed on Schedule J:

[13] It should be noted that this amount does not include the monthly car payments and insurance on the vehicle Mr. Long purchased post-petition.

[14] It is impossible to calculate an exact amount of his monthly expenses based on his testimony and interrogatory responses. However, ECMC provided the Court with a comparison chart showing the difference in Schedule J expenses and expenses listed in his interrogatory responses. ECMC Exh. 20. Adding to the confusion was Mr. Long's testimony about his monthly expenses, much of which differed from both Schedule J and his interrogatory responses.

Monthly Expenses	**Schedule J Expenses**
Rent	$750.00
Power	$200.00
Water & Sewer	$25.00
Telephone	$80.00
Food	$500.00
Car Insurance	$84.00
Clothing	$100.00
Medical & dental expenses	$100.00
Recreation	$10.00
Transportation	$100.00
Regular expenses for operation of business	$400.00
Total Monthly Expenses	**2,349.00**

The total expenses listed on Schedule J are significantly less than the total expenses testified to at trial and included in written responses to interrogatories. For example, Schedule J lists monthly recreation expenses at $10.00. During trial, however, Mr. Long testified to spending $200.00 per month on recreation (including greens fees and dining out) and $65.00 per month for a YMCA membership. Monthly transportation expenses from Schedule J were listed as $100.00, but according to Mr. Long's testimony he spends $100.00 per month on oil changes and $275.00 per month on gasoline. Medical expenses of $100.00 per month were listed on Schedule J. At trial, Mr. Long testified that he spends $200.00 per month on medical expenses even though no one in his household has a chronic medical condition. Monthly telephone service was listed in Schedule J at

$80.00. At trial, Mr. Long said his monthly telephone bill was $30.00 and his cellular telephone bill was $94.00. Schedule J lists monthly clothing expenses as $100.00 but his interrogatory responses state he spend $300.00 per month on clothing.

A number of expenses Mr. Long testified about at trial or listed in written interrogatory responses were not listed on Schedule J, including monthly cable service of $45.00, monthly gas heat (winter only) of $300.00 to $400.00 and cellular telephone service of $94.00.

Finally, four days before filing this adversary proceeding seeking to discharge his student loan obligations (and three months after filing this case) Mr. Long purchased a used 2001 Honda Accord from Roebuck Honda in Gadsden for $23,300.00. ECMC Exh. 18. After making a cash down payment of $7,500.00, the total amount financed through Honda was $15,800.00 at an interest rate of 23.99%. Id. Monthly payments on the vehicle are $454.44. Id. His youngest son, who was 15 at the time, now drives his old vehicle, a 1995 Saturn. Because the Honda was purchased post-petition, car payments and insurance on the vehicle were not included on Mr. Long's Schedule J.

Mr. Long filed this Chapter 7 case on March 25, 2004 and subsequently filed this adversary proceeding on June 25, 2004 to determine the dischargeability of certain student loan obligations owed to ECMC.

II. CONCLUSIONS OF LAW

Congress' main purpose in enacting the Bankruptcy Code was to ensure the insolvent debtor a fresh start by discharging his prepetition debts. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). In furtherance of Congress' fresh start policy, the Eleventh Circuit has generally construed exceptions to discharge narrowly. Haas v. Internal Revenue Service (In re Haas), 48 F.3d 1153, 1158 (11th Cir. 1995); Equitable Bank v. Miller

(In re Miller), 39 F.3d 301, 304 (11th Cir. 1994). However, 11 U.S.C. § 523(a)(8) specifically provides that only in certain circumstances will education loans extended by or with the aid of a governmental unit or nonprofit institution solely on the basis of the student's future earnings potential be discharged in bankruptcy. Several reasons have been cited to explain why Congress excepted student loans from a discharge in bankruptcy. One source claims that it was in response to "the perceived need to rescue the student loan program from insolvency, and to also prevent abuse of the bankruptcy system by students who finance their higher education through the use of government backed loans, but then file bankruptcy petitions immediately upon graduation even though they may have or will soon obtain well-paying jobs, have few other debts, and have no real extenuating circumstances to justify discharging their educational debt." Green v. Sallie Mae (In re Green), 238 B.R. 727, 732-733 (Bankr. N.D. Ohio 1999) (citing the "Report of the Commission on the Bankruptcy Laws of the United States," H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., Pt. II 140, n.14). Another source claims that Congress enacted 11 U.S.C. § 523(a)(8) to ensure that these kinds of loans could not be discharged by recent graduates who would then pocket all future benefits derived from their education. Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738 (6th Cir. 1992) (citing H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 466-75 reprinted in 1978 U.S.C.C.A.N. 5787).

However, notwithstanding these policy concerns, Congress also realized that not all student debtors abused the bankruptcy system, and that some student debtors were truly in need of bankruptcy relief. Thus, Congress determined that an absolute bar to the dischargeability of student loan debts would be too harsh and also unnecessary to effectuate the foregoing policy goals. Consequently, unlike other types of debt, such as alimony and child support for which a debtor

cannot receive a bankruptcy discharge, Congress permitted student loan debts to be discharged if the debtor could demonstrate extenuating circumstances.

A. Dischargeability

A student loan is not dischargeable "unless excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents."[15] 11 U.S.C.§ 523(a)(8). The creditor bears the initial burden of both proving that a debt is owed and such debt is the type contemplated by § 523(a)(8). Roe v. The Law Unit, et al. (In re Roe), 226 B.R. 258, 268 (Bankr. N.D. Ala. 1998). Once proven, the burden shifts to the debtor to show that repayment of the debt would cause an undue hardship. Id. The appropriate standard of proof for § 523(a)(8) is a preponderance of the evidence. Grogan v. Garner, 498 U. S. 279, 290 (1991).

1. The Debt

Mr. Long acknowledged in the "Joint Stipulation of Facts" submitted to the Court that he owes the debt to ECMC, that ECMC is the type of entity contemplated by § 523(a)(8) and that the consolidated student loans are the type contemplated by § 523(a)(8). Therefore, the burden at trial was shifted to Mr. Long to prove that repayment of the debt would be an undue hardship on him and his dependents.

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[15] Section 523(a)(8) provides :

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

2. Undue Hardship

The Eleventh Circuit Court of Appeals recently adopted the three part test for proving "undue hardship" that was first articulated by the Second Circuit in Brunner v. New York State Higher Educ. Serv. Corp, 831 F.2d 395 (2d Cir. 1987). Hemar Ins. Corp. of Am. v. Cox (In re Cox), 338 F.3d 1238 (11th Cir. 2003). Quoting Brunner, the Eleventh Circuit stated that

> [to establish "undue hardship," the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Cox, 338 F.3d at 1241. This Court previously used the three part test established in Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. 532, 536-545 (Bankr. E.D. Pa. 1979) when determining undue hardship for student loan dischargeability. However, the Court now uses the Brunner test to conform with the Eleventh Circuit's holding in Cox.

I. First Brunner Factor

The first Brunner factor requires Mr. Long to prove that based on his current income and expenses he cannot maintain a "minimal" standard of living for himself and his minor son if he is forced to repay the student loans.[16] Courts have taken differing views about what constitutes a "minimal" standard of living. Few courts still use the United States Department of Health and Human Services Poverty Guidelines as a "bright line" determination of the minimal standard of

[16] The Court considered only Mr. Long's minor son as a dependent when calculating the poverty level based on family size.

living for student loan dischargeability purposes.[17] The Court does not believe that, in most cases, a debtor and his family living at or slightly above the federally defined poverty line is maintaining a "minimal" standard of living. Therefore, this Court rejects the notion that a debtor must fall below the federal poverty line to discharge a student loan.

This Court believes that a more thoughtful, analytical approach should be taken. A minimal standard of living lies somewhere between "poverty and mere difficulty." McLaney v. Kentucky Higher Educ.Assistance Authority (In re McLaney), 314 B.R. 228, 234 (Bankr. M.D. Ala. 2004). The court must examine the debtor's living situation to ensure that the debtor has no unnecessary and frivolous expenses; however, the debtor should not be forced to live in abject poverty with no comforts. Judge Benjamin Cohen best described a minimal standard of living as "a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." Ivory v. United States Dep't. of Educ. (In re Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). Judge Cohen went on to list numerous basic necessities needed to maintain a minimal standard of living:

> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.
> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.
> 3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
> 4. People need vehicles to go to work, to go to stores, and to go to doctors. They must

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[17] These guidelines define eligibility for certain government benefits and programs and are designed to assist the needy and economically disadvantaged. According to the 2005 Health and Human Services Poverty Guideline, the poverty level for a family of two is $12,830.00 per year. Federal Register, Vol. 70, No. 33, February 18, 2005, pp. 8373-8375, *available at* http://aspe.hhs.gov/poverty/05poverty.shtml (last visited July 14, 2005.)

> have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
> 5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
> 6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

Id. Brunner requires that this determination be based on the debtor's current income and expenses, thus the Court must look at the debtor's income and expenses at the time of trial. See Cox, 338 F.3d at 1241.

In this case it is difficult to determine Mr. Long's actual monthly expenses, his monthly income, or to do a simple comparison of his monthly income versus his monthly expenses to determine if he can maintain a minimal standard of living. However, based on the testimony and other evidence, Mr. Long appears to have made few, if any, financial sacrifices. He plays golf four times per month, he dines out regularly (including every day for lunch), he maintains his YMCA membership and he recently purchased a car even though no evidence was provided that his old car needed to be replaced.

This Court is generally reluctant to pick apart a debtor's schedules and testimony trying to squeeze every last dime from him. However, when a debtor seeks to discharge a substantial student loan debt while maintaining his prepetition spending habits, especially when no financial sacrifices are being implemented, the Court feels compelled to do so.

The Court finds that Mr. Long either overestimated some of his monthly expenses or he has no real knowledge of the actual amount and his "guesstimates" are inconsistent. For instance, $100.00 per month for oil changes and $275.00 for gasoline on two vehicles seems high given that

there was no testimony suggesting excessive driving or vehicle usage.[18] The Court also questions Mr. Long's recreation expenses. Based on his testimony he spends $200.00 on recreation (four rounds of golf and dining out) per month (up from $10.00 per month on Schedule J), $65.00 per month for a YMCA membership and $46.00 per month for cable television. The Court recognizes that "[p]eople must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet." Ivory, 269 B.R. at 899. However, Mr. Long may not argue that repayment of his student loan obligations will cause an undue hardship while at the same time spending over $300.00 per month on such "diversions."

The Court is also concerned with the amount Mr. Long spends dining out. He eats lunch out every day, costing him approximately $115.00 per month. His interrogatory responses indicate he spends $200.00 per month dining out.[19] Additionally, according to his testimony, a portion of his $200.00 "recreation" expense is also used for dining out. Clearly, Mr. Long spends a large portion of his monthly income dining out. In the Court's opinion, it is too high in light of his current circumstances and could be reduced.

Finally, three months after filing this case and only four days before filing this adversary proceeding, Mr. Long purchased a 2001 Honda Accord for $23,000.00 at an interest rate of 23.99% and monthly payment of $454.44. No evidence was presented showing that his previous vehicle, a

[18] Mr. Long testified that he changes the oil in his vehicles every 3,000 miles. Assuming an oil change costs $25.00, the estimated $100.00 would pay for four oil changes per month. At that rate, Mr. Long and his son would have to drive their two vehicles in excess of 12,000 miles per month to necessitate four oil changes.

[19] It is unclear whether the $115.00 for lunches is included in this $200.00.

1995 Saturn, needed to be replaced. In fact, his youngest son is now driving that vehicle.[20] Mr. Long could certainly have found a less expensive vehicle with a more reasonable monthly car payment and/or a lower interest rate or at least delayed purchasing a new vehicle until he was more financially stable. That Mr. Long felt it was reasonable to incur such a large debt while seeking to discharge his student loans seriously concerns the Court. While this Court recognizes the difficulty in financing a car purchase after bankruptcy, with a $7,500.00 cash down payment the Court believes he could have purchased something with a lower monthly payment.

The Court also finds that even if Mr. Long reduced each of his expenses by a little bit, there would be sufficient income to provide a standard of living that is better than minimal. Based on the foregoing, the Court believes Mr. Long can maintain a "minimal" standard of living for himself and his dependent son if forced to repay his student loan at this time. A number of Mr. Long's expenses are more than necessary and could be reduced in order to begin repayment of the student loan obligation.

Therefore, Mr. Long has failed to prove the first prong of the Brunner test. Because the first element of Brunner was not proven the student loan obligation may not be discharged. However, the Court will discuss the remaining two Brunner factors as they relate to this case.

ii. Second Brunner Factor

The second Brunner factor requires the debtor to show additional circumstances indicating that his or her state of affairs (that is, his inability to maintain a minimal standard of living if forced to repay the student loans) is "likely to persist for a significant portion of the repayment period."

[20] His son was more than six months from turning 16 years old when Mr. Long purchased the vehicle. In Alabama, one must be at least 16 years of age to receive a driver's license. Therefore, for at least six months Mr. Long had two vehicles for only one driver.

Brunner, 831 F.2d at 396. These circumstances must demonstrate a "certainty of hopelessness, not simply a present inability to fulfill financial commitment." Nys v. Educ. Credit Mgmt., Corp. (In re Nys), 308 B.R. 436, 443 (B.A.P. 9th Cir. 2004). See also Cox, 338 F.3d at 1242. While there is no definitive list of what are considered "additional circumstances," they may include:

> 1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement;
> 2. The debtor's obligations to care for dependents;
> 3. Lack of, or severely limited education;
> 4. Poor quality of education;
> 5. Lack of usable or marketable job skills;
> 6. Underemployment;
> 7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
> 8. Limited number of years remaining in work life to allow payment of the loan; Brunner,
> 9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
> 10. Lack of assets, whether or not exempt, which could be used to pay the loan;
> 11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
> 12. Lack of better financial options elsewhere.

In re Nys, 308 at 446-47 (internal citations omitted). Where the debtor is "apparently healthy, presumably intelligent and well-educated, and shows no evidence of extraordinary burdens which would impair further employment prospects" discharge of student loan obligations is inappropriate." Shankwiler v. Natl. Student Loan Marketing, et al. (In re Shankwiler), 288 B.R. 701, 706 (Bankr. C.D. Cal. 1997).

The Court must begin by noting its previous conclusion that Mr. Long does not have a present inability to fulfill his financial commitments, specifically his student loan obligation to ECMC and will be able to maintain a far more than minimal standard of living if forced to repay that obligation. His current financial condition is not dire and certainly permits him to begin repaying

his loan, especially in light of the various Direct Loan repayment plans available to him. However, the Court believes it is necessary to discuss the second Brunner factor in this case.

Mr. Long failed to establish any additional factors which suggest his financial condition is likely to continue for a significant portion of the repayment period. In fact, his financial situation has been improving and will likely continue to do so. He is a healthy, extremely well educated man[21] with a number of productive work years ahead of him. Other than his continuing battle with addiction he suffers from no other major medical conditions that are likely to affect his ability to hold a steady job, nor do either of his children suffer from major medical problems that require specialized care. He testified that his sons had recently been treated for staph infection and his youngest son was injured playing football and required medical treatment. Neither of these are ongoing medical conditions, though.

Mr. Long argues his addiction to drugs and alcohol should be considered by the Court as an "additional circumstance." However, a debtor's drug and/or alcohol addiction was not an "additional circumstance" contemplated by Congress when the Bankruptcy Code was drafted. See, e.g., Roach v. United Student Aid Fund (In re Roach), 288 B.R. 437, 446 (Bankr. E.D. La. 2003). While Mr. Long's former addiction is unfortunate, the possibility of relapse does not necessarily prevent him from obtaining employment or advancement. In fact, Mr. Long has successfully resumed the practice of law. This Court is confident that Mr. Long's participation in the State Bar's Lawyer's Assistance Program and Alcoholics Anonymous will assist in his continued sobriety.

Other factors suggest that Mr. Long's financial situation will continue to improve. Mr. Long

[21] Mr. Long held down a full-time job while attending law school and passed the Alabama State Bar examination which suggests that he is bright and capable of increasing and improving his law practice.

stated his financial situation had improved since his law license was reinstated but that rebuilding his law practice is a "slow process." His income has increased incrementally each year since he resumed practicing law in 2002. He estimates that he may earn $36,000 this year, an increase of nearly 25% from 2002. Additionally, Mr. Long's only minor child is now sixteen years old and in eighteen months will no longer be a dependent, further reducing his monthly expenses.

Mr. Long is not limited to a law practice, and his options are certainly enhanced by his education and work experience. He holds both a Bachelor's degree and a Juris Doctorate and prior to attending law school he had a successful career in the insurance industry earning the same, if not more, than he currently earns in addition to having medical and retirement benefits. This Court does not believe that he is "entitled to an undue-hardship discharge by virtue of selecting an education that failed to return economic rewards." Coveney v. Costep Servicing Agent, et al. (In re Coveney), 192 B.R. 140, 143 (Bankr. W.D. Tex. 1996)(citing Matter of Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993)).

Given a little more time and his expanding practice it is entirely possible that Mr. Long's practice will grow and flourish. Because Mr. Long has demonstrated no "additional, exceptional circumstances" that suggest his current financial situation will continue for a substantial portion of the repayment period he has failed to prove the second prong of the Brunner test. Because the second element of Brunner was not proven the student loan may not be discharged. However, in order to complete the nondischargeability analysis, the Court will examine the third Brunner prong.

iii. Third Brunner Factor

The third Brunner factor requires a showing that the debtor made a good faith effort to repay the student loans. Brunner, 831 F.2d at 396. What is considered a debtor's good faith effort varies

widely among courts; however, courts are generally reluctant to find good faith where a debtor made minimal or no payments on his or her student loans. See, e.g., Murphy v. CEO/Manager, Sallie Mae, et al. (In re Murphy), 305 B.R. 780 (Bankr. E.D. Va. 2004)(no good faith where the debtor made no payments on her student loans); Garrett v. New Hampshire Higher Educ. Assistance Found., et al. (In re Garrett), 180 B.R. 358, 364 (Bankr. D.N.H. 1995)(no good faith shown where "[t]he record is devoid of any payment made by [the debtor] on these loans or even any attempt to enter into a repayment schedule with [the lenders]"). Other factors to consider include the amount of the student loan debt as a percentage of the debtor's total indebtedness and whether the debtor attempted to find employment. See, e.g., Murphy, 305 B.R. at 798 (citing Hall v. U.S. Dep't. of Educ. (In re Hall), 293 B.R. 731, 737 (Bankr. N.D. Ohio 2002)(citations omitted).

Some courts also consider whether the debtor attempted to negotiate a repayment plan, or explored various repayment options such as the standard repayment plan, extended repayment plan, graduated repayment plan and income contingent repayment plan. See, e.g., Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 315 B.R. 554, 563 (B.A.P. 9th Cir. 2004): Cota v. U. S. Dept. of Educ. (In re Cota), 298 B.R. 408, 420 (Bankr. D. Ariz. 2003). A debtor's failure to take advantage of those repayment options is not per se indicative of bad faith, however. Cota, 298 B.R. at 420. The U.S. Department of Education's repayment plans may not be used as a sword to prevent dischargeability of student loans if the debtor chooses not to participate in them.

Since graduating from Jones Mr. Long has made four $220.66 payments towards his student loans, all within a three month period in 1998. He sought and was granted a number of forbearances and/or deferments between 1997 and 2003. Other than the four payments made in 1998, no additional full or partial payments have been made. While this alone may not indicate a lack of good

faith, given the totality of the circumstances the Court believes that Mr. Long has not demonstrated a good faith effort to repay his student loan obligations.

From August 1998 until November 1999, Mr. Long spent between $500.00 and $1,000.00 per week on drugs.[22] That money, or at least a portion of it, could have been used to begin repaying his student loan obligation to ECMC. While the Court sympathizes with Mr. Long's addiction and applauds his diligence in requesting numerous forbearances and deferments, his failure to repay the debt during those times when it appears he had the financial ability to do so cannot be overlooked simply because of his addiction. This Court is compelled to determine that a debtor who forbears a debt and uses money which otherwise could have gone to repay that debt to buy illegal drugs and alcohol demonstrates a lack of good faith to repay the debt.

More recently, Mr. Long made a $7,500.00 cash down payment on a 2001 Honda Accord. Despite having this much excess cash on hand, he chose not to send any of it to ECMC. Even sending a portion of that money to ECMC would have shown the Court Mr. Long was at least attempting to repay his student loan obligation, thus demonstrating a minimal level of good faith.

Further, Mr. Long knew or should have known of the various repayment programs offered by the Department of Education but chose not to explore them. That Mr. Long chose not to take advantage of one of these programs is not alone sufficient to demonstrate his lack of good faith. However, had he at least explored and considered the programs, even if he ultimately chose not to utilize them, the Court would find it easier to accept that his failure to pay was in good faith.

Finally, Mr. Long scheduled an unsecured student loan debt of $30,583.06 owed to ECMC.

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[22] The Court acknowledges the testimony about Mr. Long's struggles and tragedies in his personal life. However, while the Court is sympathetic, this does not change the Court's ultimate conclusion.

However, according to the "Stipulation of Facts" the total amount due on the student loan debt is $55,778.28. This student loan debt accounts for nearly 40% of the total debt he seeks to have discharged in his Chapter 7 bankruptcy.

Based on the foregoing, the Court finds that Mr. Long has not made a good faith effort to repay his student loan obligations and therefore has failed to prove the third prong of the Brunner test. Because the third Brunner element was not proven the student loan may not be discharged.

III. CONCLUSION

Discharge of student loan obligations should be limited to only exceptional cases. This is not such a case. Mr. Long failed to prove that he and/or his son will suffer undue hardship if he is forced to repay his student loan obligation to ECMC. Although he deserves credit for successfully overcoming both his addiction and tragedy in his personal life, the Court does not believe the facts of this case warrant a discharge of his student loan debt. Therefore, the Court finds that Mr. Long's consolidated student loan held by ECMC is not dischargeable under 11 U.S.C. § 523(a)(8). Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Debtor, John Long, to declare his student loan debt dischargeable pursuant to 11 U.S.C. § 523(a)(8) is **DENIED.** Accordingly, the balance of Mr. Long's consolidated student loan debt owed to the Defendant, Educational Credit Management Corporation, is hereby declared to be **NONDISCHARGEABLE**.

Dated this the 29th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: David Murphree, Attorney for the Plaintiff, John Long
W. McCollum Halcomb, Attorney for the Defendant, ECMC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JOHN THOMAS LONG,	)	**Case No. 04-02736-TOM-7**
	)	
Debtor.	)	

JOHN THOMAS LONG,	)	
	)	
Plaintiff	)	**A.P. No. 04-00111**
	)	
vs.	)	
	)	
SALLIE MAE SERVICING, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In conformity with the Memorandum Opinion entered contemporaneously herewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Debtor, John Long, to declare his student loan debt dischargeable pursuant to 11 U.S.C. § 523(a)(8) is **DENIED.** Accordingly, the balance of Mr. Long's student loan debt owed to Defendant, Educational Credit Management Corporation, is hereby declared to be **NONDISCHARGEABLE** and a judgment to that effect is hereby entered.

Dated this the 29th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: David Murphree, Attorney for the Plaintiff, John Long
W. McCollum Halcomb, Attorney for the Defendant, ECMC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ARTHUR WAYNE ELLIS,	)	**Case No. 04-06834-TOM-7**
	)	
Debtor.	)	

ELEANOR M. TYSON,	)	
	)	
Plaintiff	)	**A.P. No. 04-00207**
	)	
vs.	)	
	)	
ARTHUR WAYNE ELLIS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a trial on July 18, 2005, on the *Complaint* filed by the Plaintiff, Eleanor M. Tyson ("Ms. Tyson" or "Plaintiff"). Appearing at the trial were: M. Scott Harwell, attorney for Ms. Tyson; Daisy Holder, attorney for the Debtor / Defendant, Arthur Wayne Ellis ("Mr. Ellis" or "Debtor"); Ms. Tyson; Mr. Ellis; Bennie Dixon, witness for Ms. Tyson; and James Williams, witness for Ms. Tyson. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I) and (J).[2]

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[1] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority

The Court has considered the pleadings, the arguments of counsel, the testimony, the evidence admitted and the law and finds and concludes as follows.[3]

I. FACTUAL BACKGROUND

Ms. Tyson and Mr. Ellis first met in the late-1970's or early-1980's while both were employed by the Birmingham Police Department ("BPD"), Mr. Ellis as a patrolman and Ms. Tyson in fingerprinting. They had a romantic relationship lasting four or five years. They rekindled their

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> conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.
>
> 28 U.S.C. § 157(a) provides:
>
> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> 28 U.S.C. § 1334(b) provides:
>
> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> The General Order of Reference as amended provides:
>
> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. §§ 157(b)(2)(I) and (J) provide:

> (b)(2)Core proceedings include, but are not limited to–
>
> (I) determinations as to the dischargeability of particular debts;
>
> (J) objections to discharge [.]

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

relationship in early 2003, and Mr. Ellis moved in with Ms. Tyson a short time later. Ms. Tyson testified that she did not know Mr. Ellis was married when their second relationship began in 2003 but discovered it soon thereafter and they continued living together until their relationship ended seven months later.

During that seven month period, Ms. Tyson allegedly paid numerous bills for Mr. Ellis including, *inter alia*, mortgage payments, utility bills and tuition for truck driving school. She also allegedly purchased numerous items for him including, *inter alia*, building supplies and clothing and gave him cash on several occasions. At trial, exhibits purporting to show these expenditures by Ms. Tyson were introduced.[4] She explained each exhibit's significance and the debt it allegedly evidenced. For each exhibit, Ms. Tyson's attorney asked if Mr. Ellis had promised to repay her. She answered "yes" each time. She said all of the expenditures were loans and she expected to be repaid by Mr. Ellis. She also testified she and Mr. Ellis reached an agreement under which he agreed to repay her all of the money loaned.

On only one occasion did Mr. Ellis sign a promissory note ("Note") to Ms. Tyson. Plaintiff's Exh. 3. Pursuant to the terms of that Note, which was executed on April 23, 2003, Mr. Ellis agreed to repay Ms. Tyson a total of $1,538.00 at $75.00 per week. Because Mr. Ellis was unemployed at the time, repayment was to begin one month after Mr. Ellis returned to work. Mr. Ellis testified that he intended to repay the debt evidenced by the Note when he signed it.

Mr. Ellis explained that while he was living with Ms. Tyson he traded mostly in cash and Ms. Tyson suggested she write checks to pay his bills and expenses because they would provide better

[4] The Plaintiff introduced more than thirty receipts, cancelled checks and other documents at trial.

receipts. Acknowledging he was a poor records keeper, he said that he accepted her offer but gave her cash to cover the checks written on his behalf.

Mr. Ellis testified that Ms. Tyson had discussed marriage on several occasions and offered to pay for him to divorce his wife. Ms. Tyson denied both allegations. The two did, however, attend counseling for their relationship. Ms. Tyson testified that Mr. Ellis initiated the counseling "to establish that she could trust him."

After the relationship ended, Ms. Tyson filed a *pro se* lawsuit against Mr. Ellis in Jefferson County District Court on March 3, 2004, alleging she was owed $9,815.59 for "Cash Loans, Rent, telephone bills, Electric (Power bill), building Supplies[,] Clothing, House payment, tuition, Driving School (Truck), Training program car salesman, Electrical repairs, repairman, Gas [and] misc."[5] Defendant's Exh. 2. Following a bench trial at which both parties were present, a judgment was entered in Ms. Tyson's favor for $9,011.41 on June 29, 2004.[6]

Mr. Ellis filed this individual no-asset Chapter 7 bankruptcy case on August 6, 2004 and included Ms. Tyson as an unsecured nonpriority creditor holding a claim of $9,012.00. On November 5, 2004, Ms. Tyson filed this adversary proceeding alleging the debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)[7] and also objecting to discharge pursuant to 11 U.S.C. §§

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[5] It is unclear whether Ms. Tyson later retained counsel in the state court action.

[6] Prior to the trial, counsel for both parties met with the Court and agreed that the state court judgment is res judicata as to the amount and validity of the debt owed and this adversary proceeding trial is to determine if the debt is dischargeable. Mr. Ellis continued to dispute owing the debt. However, this Court is barred by the *Rooker-Feldman* doctrine from reviewing the validity of the amount of the state court judgment.

[7] The Complaint does not indicate whether the Plaintiff is relying on 11 U.S.C. § 523(a)(2)(A), (B) or both.

727(a)(2)(A) & (B), 727(a)(3), 727(a)(4)(A) & (D) and 727(a)(5).

II. CONCLUSIONS OF LAW

The central goal of the bankruptcy system is to provide certain debtors with a "fresh start" in which to enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 LED.2d 755 (1991)(quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)). This opportunity for a completely unencumbered "fresh start" is limited, however, to only the "honest but unfortunate debtor." Id.

A. Denial of Discharge

The Bankruptcy Code requires that debtors receive a discharge unless one of the statutory exceptions found in 11 U.S.C. § 727 is proved. Denial of discharge is a harsh remedy, one that should be exercised only under extreme circumstances. To further the "fresh start" objective of the Bankruptcy Code, the statute should be strictly construed against the party objecting to discharge and in the light most favorable to the debtor. See Overly v. Guthrie (In re Guthrie), 265 B.R. 253, 263 (Bankr. M.D. Ala. 2001); Behrman Chiropractic Clinics, Inc. v. Johnson (In re Johnson), 189 B.R. 985, 992 (Bankr. N.D. Ala. 1995). The plaintiff has the burden of proof on a complaint objecting to discharge. Fed. R. Bankr. P. 4005.

Ms. Tyson contends that Mr. Ellis should be denied a discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) & (B), 727(a)(3), 727(a)(4)(A) & (D) and/or 727(a)(5).[8] However, the Court finds that

[8] In pertinent part, 11 U.S.C. § 727 provides:

> (a) The court shall grant the debtor a discharge, unless–
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred,

Ms. Tyson did not offer any testimony or evidence suggesting that Mr. Ellis made a false oath, withheld any information or lost any assets. Therefore, she provided insufficient evidence at trial to support a denial of discharge under §§ 727(a)(4)(A) or (D) or 727 (a)(5), therefore the Court will not further examine whether discharge should be denied under those sections. The Court is left only to determine in detail whether denial of discharge is proper under §§ 727(a)(2)(A) or (B) or 727(a)(3).

1. Section 727(a)(2)(A) & (B)

Section 727(a)(2) of the Bankruptcy Code is intended to prevent the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. Specifically, § 727(a)(2)(A) provides that discharge should be denied to a debtor who, within one year of filing, destroys or conceals his or her assets that may otherwise have been available to satisfy creditors' claims. 11 U.S.C. § 727(a)(2)(A). Similarly, § 727(a)(2)(B) provides that discharge

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> removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> (3) the debtor has concealed destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; [or]
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account; ...
>
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet debtor's liabilities.

should be denied to a debtor who, after filing, destroys or conceals assets of the estate that may otherwise have been available to satisfy creditors' claims. 11 U.S.C. § 727(a)(2)(B).

After reviewing the record, the pleadings and the trial testimony, the Court is unable to determine what, if any, property Mr. Ellis allegedly concealed or destroyed. There is no evidence of depleted bank accounts, property transfers or the like. Further, neither Ms. Tyson nor Mr. Ellis testified about concealment or transfer of any property.

Based on the foregoing, the Court finds that Ms. Tyson did not prove that Mr. Ellis concealed or otherwise disposed of his assets or assets of the estate. Thus, she failed to satisfy her burden of proof under this section. Accordingly, the Court overrules Ms. Tyson's objection to the Debtor's discharge under 11 U.S.C. § 727(a)(2)(A) or (B).

2. Section 727(a)(3)

Section 727(a)(3) is intended to prevent the discharge of a debtor who fails to maintain or preserve books or records. The application of §727(a)(3) requires a two-tiered analysis. First, the court must determine whether the debtor has maintained adequate books and records from which his or her "financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3). Second, if the debtor failed to maintain adequate records the court must determine whether such failure was "justified under all of the circumstances of the case." Id.

The initial burden of proof is on the plaintiff to show that the debtor does not have sufficient books and records from which to satisfactorily ascertain the debtor's financial situation and business transactions. See Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984). Once proven, the burden shifts to the debtor to explain the lack of financial records in a satisfactory manner. Id. The explanation must consist of more than just the debtor's assertion that the records

no longer exist or are no longer available. Christy, et al. v. Kowalski (In re Kowalski), 316 B.R. 596 (Bankr. E.D.N.Y. 2004).

The record keeping requirement of § 727(a)(3) has been broadly construed. The debtor is not required to maintain an impeccable system of bookkeeping; rather, a debtor may satisfy the requirement if "the books and records are kept ... so as to reflect, with a fair degree of accuracy, the debtor's financial condition and in a manner appropriate to his business." Emerson v. Stephenson (In re Emerson), 244 B.R. 1, 25 (Bankr. D.N.H. 1999)(citations omitted). See also Turner v. Tran (In re Tran), 297 B.R. 817, 835 (Bankr. N.D. Fla. 2003); Phillips v. Nipper (In re Nipper), 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995)(a full accounting of every transaction is not required so long as the debtor maintains "some written records from which present and past financial condition of debtor may be ascertained with substantial completeness and accuracy.").

Ms. Tyson failed to satisfy the initial burden of proof that Mr. Ellis did not maintain adequate records from which his financial condition could be ascertained. She did not state what specific financial records Mr. Ellis failed to maintain or what additional records may be necessary to adequately assess his finances, and the Court will not guess as to what those records may be.

The only trial testimony concerning Mr. Ellis's financial records, or lack thereof, concerned his failure to maintain written receipts of cash payments he allegedly made to Ms. Tyson and mortgage payments he made to Washington Mutual. Whether or not he kept these records is insufficient as they would provide no additional insight into his overall financial condition. Further, there is no evidence that Ms. Tyson ever requested additional financial information from Mr. Ellis. Finally, no evidence was presented showing Mr. Ellis destroyed, concealed or mutilated any of his financial records.

Mr. Ellis is an individual debtor whose financial situation is not extremely complex. Like the vast majority of debtors before this Court, he was a poor record keeper, traded mostly in cash and rarely kept receipts as proof of payments made. However, simply being a poor record keeper does not warrant denial of discharge under § 727(a)(3). While his financial records may not be impeccable, the Court is satisfied that they are sufficient in this case.

Based on the foregoing, the Court finds that Ms. Tyson did not prove Mr. Ellis concealed, destroyed or failed to adequately maintain his financial records. Thus, she failed to meet her initial burden of proof under this section. Accordingly, the Court overrules Ms. Tyson's objection to the Debtor's discharge under 11 U.S.C. § 727(a)(3).

B. Dischargeability of the Debt

Section 523 of the Bankruptcy Code outlines exceptions to discharge in bankruptcy proceedings. Exceptions to discharge are to be construed strictly against the objecting creditor in order to give effect to the fresh start policy of the Bankruptcy Code. See Hope v. Walker (In re Walker), 48 F.3d 1161 (11th Cir. 1995). A creditor seeking to except a debt from discharge bears the burden of proof as to each particular element of nondischargeability by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 LED.2d 755 (1991). Ms. Tyson contends that the debt owed to her is nondischargeable under 11 U.S.C. §§ 523(a)(2).[9] She did not,

[9] In pertinent part, 11 U.S.C. § 523 provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> (B) use of a statement in writing--

however, specify upon which subparagraph of § 523(a)(2) she was relying. Therefore, the Court must examine non-dischargeability under both subparagraphs.

1. Section 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt for money, property, services, or an extension, renewal, or refinancing of credit will not be discharged to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). The elements that the plaintiff must establish for a determination of nondischargeability under this section include: 1) the debtor received or obtained money or property from the plaintiff, which creates a debt or obligation to the plaintiff; 2) the money or property was obtained and the debt incurred by either false pretenses, a false representation, or actual fraud; 3) the false pretense, false representation, or actual fraud was done by the debtor either knowingly or with reckless disregard of the truth; 4) the debtor's conduct was with the intention to deceive, with the intention that the plaintiff detrimentally rely, or with the intention that the plaintiff be given a false impression; 5) the plaintiff justifiably relied on the debtor's conduct or misrepresentation; and 6) the plaintiff suffered damages as a result of the debtor's actions. SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998).

The first element requires a finding that Mr. Ellis received money or property, thereby creating an obligation to Ms. Tyson. Based on the state court judgment, the testimony and the

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> (I) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive;

evidence, the Court finds Mr. Ellis received money from Ms. Tyson thereby creating an obligation to her. Therefore, the first element of the § 523(a)(2)(A) was met.

The second element requires a finding that the debt was incurred through false pretenses, a false representation or actual fraud. Because false pretenses, false representation and actual fraud are placed in the disjunctive, Congress intended that any one of these is sufficient to establish nondischargeability under § 523(a)(2)(A).

I. False Pretenses

The Court will first address whether Mr. Ellis incurred the debt by false pretenses. Judge Benjamin Cohen has defined the requirements for false pretenses:

> The concept of "false pretenses" is especially broad. It includes any intentional fraud or deceit practiced by whatever method in whatever manner. False pretenses "may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol or token calculated and intended to deceive."

FCC National Bank v. Gilmore (In re Gilmore), 221 B.R. 864, 872 (Bankr. N.D. Ala. 1998) (quoting BLACK'S LAW DICTIONARY 602 (6th ed. 1990)). False pretenses have also described as "a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully induced by a debtor to transfer property or extend credit to the debtor." Sterna v. Paneras (In re Paneras), 195 B.R. 395, 406 (Bankr. N.D. Ill. 1996).

Ms. Tyson testified that she knew Mr. Ellis was between jobs. She also had to know he was considering a new field of employment because he was attending truck driving school. No facts or circumstances were created or manufactured to induce her to loan money. There is no evidence that Ms. Tyson was wrongly induced into making expenditures on Mr. Ellis's behalf nor does the

evidence show that Mr. Ellis's actions were calculated to deceive Ms. Tyson. Even if Mr. Ellis promised to repay her as Ms. Tyson claims, no evidence was offered showing those promises were made in an effort to wrongfully induce her into giving him money.[10] For the foregoing reason, the Court finds that Mr. Ellis's debt to Ms. Tyson was not incurred through false pretenses.

ii. False Representation

The Court will now consider whether Mr. Ellis incurred the debt through a false representation. While a false pretense generally pertains to implied misrepresentations or conduct creating a false impression, "false representation involves an expressed misrepresentation by a debtor." Castro v. Zeller (In re Zeller), 242 B.R. 84, 87 (Bankr. S.D. Fla.1999). The First Circuit Court of Appeals has further defined the requirements for a false representation:

> If, at the time he made his promise, the debtor did not *intend to perform*, then he has made a false representation (false as to his intent) and the debt that arose as a result thereof is not dischargeable (if the other elements of §523(a)(2)(A) are met). If he did so intend at the time he made his promise, but subsequently decided that he could not or would not so perform, then his initial representation was not false when made.

Palmacci v. Umpierrez, 121 F.3d 781, 787 (1st Cir. 1997).

Ms. Tyson appears to argue that Mr. Ellis's verbal promises to repay constitute false representations. However, she offered no evidence, other than that they were not repaid, that the promises were made without the intent to perform. Failure to repay a debt does not by itself prove false representation by a debtor. The only written promise to pay is the Note, and according to Mr.

[10] Despite the state court judgment and a stipulation prior to trial as to the amount of the debt, Mr. Ellis continued to dispute that he promised to repay Ms. Tyson most of the money other than what was evidenced by the Note.

Ellis's trial testimony, he intended to repay the debt evidenced by the Note when he signed it.[11] Because he intended to perform when he signed the Note it may not be construed as a false representation.

Therefore, based on the foregoing, the Court finds that Mr. Ellis's debt was not incurred through false representation.

iii. Actual Fraud

Finally, the Court will consider whether Mr. Ellis incurred the debt through actual fraud. The Eleventh Circuit Court of Appeals has determined the elements of actual fraud to be that "(1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998). See also Field v. Mans, 516 U.S. 59, 73-75, 116 S.Ct. 437, 445-446 (1995) (holding that section 523(a)(2)(A) requires justifiable, but not reasonable, reliance).

As explained above, there is no evidence that Mr. Ellis made any false representations, either verbal or written, with the intent to deceive Ms. Tyson. Because a false representation is an element of actual fraud, and that element cannot be proven, the Court finds that the debt was not incurred through actual fraud.

Based on the foregoing, the Court finds Ms. Tyson failed to meet the second required element for nondischargeablity under 11 U.S.C. § 523(a)(2)(A), and thus the Court need not discuss the remaining issues.

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[11] The Plaintiff introduced inconsistent testimony from Mr. Ellis's deposition on this matter. The Court has weighed the evidence and Mr. Ellis's demeanor while testifying and believes Mr. Ellis's trial testimony was truthful.

2.Section 523(a)(2)(B)

Section 523(a)(2)(B) of the Bankruptcy Code provides that a debt for money, property, services, or an extension, renewal, or refinancing of credit may be excepted from discharge to the extent it was 1) obtained through the use of a written statement that is that is materially false, 2) respecting the debtor's or an insider's financial condition, 3) on which the creditor reasonably relied and 4) that the debtor caused to be made or published with intent to deceive. 11 U.S.C. § 523(a)(2)(B).

The first element of this section requires proof that Mr. Ellis received money based on a materially false written statement. The only written statement executed by Mr. Ellis and introduced at trial was the Note. Based on his trial testimony, Mr. Ellis intended to repay the debt when the Note was executed. Therefore, the Note is not a materially false written statement. Because the Note is not a materially false written statement, and no other written statements were introduced into evidence, it is impossible for Ms. Tyson to satisfy the first element of 523(a)(2)(B).

Therefore, based on the foregoing, the Court finds Ms. Tyson failed to meet the required elements for nondischargeablity under 11 U.S.C. § 523(a)(2)(B).

III. CONCLUSION

Based on the evidence and testimony in this case, the Court finds that Ms. Tyson has failed to prove by a preponderance of the evidence that the debt owed to her by Mr. Ellis should be declared nondischargeable under 11 U.S.C. § 523(a)(2)(A) or (B). The Court further finds that Ms. Tyson has failed to prove by a preponderance of the evidence that Mr. Ellis should be denied a discharge under 11 U.S.C. §§ 727(a)(2)(A) or (B), 727(a)(3), 727(a)(4)(A) or (B), or 727(a)(5). Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Plaintiff, Eleanor M. Tyson, to declare certain indebtedness of the Debtor, Arthur Ellis, nondischargeable in accordance with 11 U.S.C. §§ 523(a)(2) is **DENIED**. It is further

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Plaintiff, Eleanor M. Tyson, to deny discharge to the Debtor, Arthur Ellis, in accordance with 11 U.S.C. §§ 727(a)(2)(A) or (B), 727(a)(3), 727(a)(4)(A) or (B), or 727(a)(5) is **DENIED**. It is further

ORDERED, ADJUDGED, AND DECREED that the indebtedness of the Debtor, Arthur Ellis, to the Plaintiff, Eleanor Tyson, is **DISCHARGEABLE** and shall be included in the discharge of the Debtor to be entered in this case by order of this Court.

Dated this the 4th day of August, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: M. Scott Harwell, Attorney for the Plaintiff, Eleanor Tyson
Daisy Holder, Attorney for the Debtor / Defendant, Arthur Ellis

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CITATION CORPORATION, *et al.*,[1]	)	
	)	**Case No. 04-8130-TOM-11**
	)	**(Jointly Administered)**
Debtors.	)	
	)	

AVCO CORPORATION,	)	
	)	
Creditor,	)	
	)	
v.	)	**Contested Matter**
	)	
CITATION CORPORATION, et al.,	)	
	)	
Debtors.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Citation Corporation's, its holding company, and certain of its direct and indirect subsidiaries, as debtors and debtors-in-possession in the jointly administered bankruptcy case (collectively the "Debtors") *Motion for Ruling on Debtors' Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* ("Motion

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[1] In addition to the Citation Corporation, the Debtors include the following entities: (i) Citation Holding Company, (ii) Berlin Foundry Corporation, (iii) Bohn Aluminum, Inc., (iv) Castwell Products, Inc., (v) Citation Precision, Inc., (vi) HI-TECH, Inc., (vii) Iroquois Foundry Corporation, (viii) ISW Texas Corporation, (ix) Mansfield Foundry Corporation, (x) OBI Liquidating Corp., (xi) Texas Steel Corporation, (xiii) TSC Texas Corporation, (xiii) Citation Aluminum, LLC, (xiv) Citation Casting, LLC, (xv) Citation Grand Rapids, LLC, (xvi) Citation Lake Zurich, LLC, (xvii) Citation Michigan, LLC, (xviii) Citation Wisconsin Forging, LLC, (xix) Citation Wisconsin, LLC, (xx) ITM Holding Co., LLC, (xxi) Interstate Southwest, Ltd., (xxii) Texas Foundries Ltd., (xxiii) MFC Liquidating Company, Ltd., and (xxiv) Citation Camden Casting Center, Inc.

for Ruling") filed on June 2, 2005. AVCO Corporation ("AVCO") filed an Objection to the Motion for Ruling on June 16, 2005. A hearing was held on June 20, 2005. Appearing at the hearing were Jesse Vogtle, Jr. and Christie Dowling, Attorneys for AVCO; and Michael Hall, Chris Carson, Gerald Gillespy, Marc Solomon and Glenn Glover, Attorneys for the Debtors.

The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[2] This is a core proceeding as defined in 28

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[2] 28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157(a) provides:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

> The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

U.S.C. §157(b)(2)(B).[3]

The Motion for Ruling requests the Court lift the stay[4] on, and enter a ruling on, the Debtors' *Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation*. The Court has reviewed and considered the Motion for Ruling and the Objection thereto, arguments of counsel and the law and finds and concludes as follows.[5]

I. Factual Background

This proceeding concerns the manufacture of rough crankshaft forgings by certain

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[3] 28 U.S.C. § 157(b)(2)(B) provides:

> (b)(2)Core proceedings include, but are not limited to–
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

[4] This Court entered an Order on April 28, 2005 staying any ruling on the Debtor's *Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* and setting it for a status conference on June 20, 2005. (Proceeding No. 1605). The circumstances surrounding this Order are discussed more thoroughly in the "Factual Background" section herein.

[5] This Court may take judicial notice of the contents of its own file. See, e.g., In re Steeley, 243 B.R. 421, 427 (Bankr. N.D. Ala. 1999)(citations omitted). In addition to the Debtors' Motion for Ruling and AVCO's Objection the Court has also reviewed and considered the *Debtor's Third Amended Joint Plan of Reorganization*, all pleadings related to the Debtors' *Objection to Claims of AVCO Corporation*, the Debtors' *Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* and all related filings, AVCO's *Response to the Motion for Partial Summary Judgment* and all relating filings, the Debtors' *Reply to the Response to the Motion for Partial Summary Judgment,* AVCO's *Motion for Estimation of Claims Pursuant to §502(c)* and AVCO's *Motion for Temporary Allowance of Claims of AVCO Corporation Pursuant to Rule 3018(a) FRBP for Purposes of Rejecting or Accepting the Debtors' Joint Plan of Reorganization* and the Response thereto (collectively the "Pleadings").

Debtors under a Master Supply Agreement and addenda 1 and 2 thereto (collectively the "MSA") with AVCO. AVCO purchased rough crankshaft forgings from certain Debtors to make crankshafts for aircraft engines which AVCO manufactures and sells. A dispute arose between the parties to the MSA when crankshafts in certain AVCO aircraft engines failed.

The parties subsequently filed competing lawsuits concerning the cause of the crankshaft failures. Debtor Interstate Southwest, Ltd. ("ISW") filed a lawsuit in Grimes County, Texas ("Texas lawsuit"), the site where the rough crankshaft forgings were manufactured under the MSA.[6] AVCO then filed a lawsuit against certain Debtors, specifically IFI, Citation Wisconsin Forging, LLC and Citation Corporation ("Citation"), in Pennsylvania ("Pennsylvania lawsuit") where AVCO manufactures aircraft engines. AVCO was sued in Ohio following the crash of an airplane equipped with an AVCO manufactured engine. AVCO then filed a third party complaint against, *inter alia*, Citation, IFI and ISW in Ohio ("Ohio lawsuit") seeking indemnification and contribution. AVCO is also a named defendant in a pending Florida lawsuit which is very similar to the lawsuit currently pending against it in Ohio.[7] Unlike in Ohio, however, AVCO has not filed a third party complaint against any of the Debtors.

The Debtors filed for Chapter 11 bankruptcy protection on September 11, 2004. The Pennsylvania and Ohio lawsuits were immediately stayed. However, because a Debtor entity was the plaintiff in the Texas lawsuit, that litigation proceeded to trial. After a six week jury trial a

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[6] ISW's First Amended Original Complaint averred that Interstate Forging Inc. ("IFI"), a party to the original MSA, had assigned all of its rights in and obligations under the MSA to ISW and ISW was attorney-in-fact for IFI.

[7] Although it is unclear when the Florida lawsuit was actually filed, it appears to have been filed in the late-spring of 2005.

judgment was entered by the Texas court in favor of ISW, on its own behalf and on behalf of IFI, and against AVCO awarding damages totaling approximately $96 million (the "Texas Judgment"). The Texas Judgment is currently on appeal.

AVCO's Proofs of Claim and Subsequent Claims Litigation

AVCO, on behalf of its Textron Lycoming Reciprocating Engine Division, filed a total of three proofs of claim (Claims 30, 85 and 1957) against the Debtors' jointly administered bankruptcy estate. Claims 30 and 85 ("Original AVCO Claim") were filed on October 14, 2004 and are based on the MSA and addenda 1 and 2 thereto (collectively the "MSA") and seek, *inter alia*, damages related to allegedly defective crankshafts produced by ISW.[8] AVCO asserts the same claims in the Original AVCO Claim as it asserted in the Pennsylvania and Ohio lawsuits.

Claim 1957 ("Rejection Claim") was filed on January 7, 2005 and is based upon, *inter alia*, damages resulting from the Debtors' rejection of the MSA and a $306,000.00 contingent administrative claim relating to this Court's *Amended Consent Order Authorizing Lycoming to Take Possession of its Steel at the Navasota Facility* entered on November 18, 2004. (Proceeding No. 580).

The Debtors filed an *Objection to Proof of Claim of AVCO Corporation* ("Objection to Claim") on February 16, 2005 contending that AVCO's claims should be disallowed based on the Texas judgment. (Proceeding No. 1070) The Debtors subsequently filed a *Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* ("Summary

[8] Claims 30 and 85 are identical claims. Two different claim numbers were apparently assigned because AVCO filed the proof of claim with both the Bankruptcy Court and with the Claims Agent. The Court will therefore treat claims 30 and 85 as one claim.

Judgment Motion") on March 31, 2005 based on the same argument. (Proceeding No. 1367) AVCO filed a Response to the Summary Judgment Motion on April 14, 2005. (Proceeding Nos. 1491 & 1492)

Since an objection was pending to AVCO's claims and thus those claims were not deemed allowed claims under 11 U.S.C. § 502, AVCO was not entitled to accept or reject the Debtors' proposed plan of reorganization under 11 U.S.C. § 1126(a). Therefore, AVCO filed a *Motion for Temporary Allowance of Claims of AVCO Corporation Pursuant to Rule 3018(a) FRBP for Purposes of Rejecting or Accepting the Debtors' Joint Plan of Reorganization* (the "3018 Motion") on April 7, 2005. (Proceeding No. 1444) AVCO also filed a *Motion for Estimation of its Claim for Purposes of Allowance Pursuant to 11 U.S.C. 502(c)* (the "502 Motion") on April 14, 2005. (Proceeding No. 1493)

The Summary Judgment Motion, the 3018 Motion and the 502 Motion were all heard by this Court on April 25, 2005. Each of the Motions, as well as responses and replies thereto, were extensively briefed to this Court prior to the hearing.

Following the April 25th hearing, the Court entered an Order and Notice of Hearing staying any ruling on the Summary Judgment Motion and the 502 Motion and setting a status conference for June 20, 2005. (Proceeding No. 1605) In a separate Order on the 3018 Motion the Court estimated AVCO's claims at $0.00 (with one minor exception) for voting purposes pursuant to Rule 3018(a). (Proceeding No. 1698) In that Order the Court also noted

> Although this Court believes that the Texas Judgment may be entitled to be used by the Debtors to disallow AVCO's claims, the Court voiced its concern at the hearing as to the duplicity of judicial resources. If this Court rules on the summary judgment in favor of the Debtors based upon the Texas Judgment, then that Order will likely be appealed and

two appeals may proceed simultaneously, both dependant upon the Texas Judgment which may or may not be affirmed.

In re Citation Corp., et al., No. 04-8130, Proc. No. 1698 n.8 (Bankr. N.D. Ala. May 5, 2005)(Order on AVCO's 3018 Motion).

Shortly after the April 25, 2005 hearing the Debtors sought to transfer the Pennsylvania lawsuit to this Court. Specifically, on May 2, 2005, certain Debtors removed the Pennsylvania action to the United States Bankruptcy Court for the Middle District of Pennsylvania ("Pennsylvania Bankruptcy Court") and sought to have it transferred to this Court.[9] AVCO opposed the removal and transfer.[10] These matters were set for hearing in the Pennsylvania Bankruptcy Court on June 21, 2005. The hearing was held but this Court is not aware of a ruling by the Pennsylvania Bankruptcy Court.

In the meantime, the Debtors' Third Amended Joint Plan of Reorganization under Chapter 11 (the "Plan") was confirmed by Order of this Court on May 18, 2005. (Proceeding No. 1843) Pursuant to the Plan, AVCO is Class 5 creditor holding two general, unsecured claims. Class 5 creditors holding "allowed claims" (as defined by the Plan) will receive a pro rata share of a $10 million "pot" created by the Reorganized Debtors for the purpose of paying such claims. As previously noted, AVCO's claims are not currently "allowed claims" under 11 U.S.C. § 502 since

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[9] Debtors filed a *Notice of Removal* and a *Motion to Transfer Venue to the United States Bankruptcy Court for the Northern District of Alabama, Southern Division* in the Pennsylvania Bankruptcy Court.

[10] On May 18, 2005, AVCO filed a *Motion ... to Remand or Abstain* (and a brief in support thereof) and an *Objection to Debtor/Defendants' Motion to Transfer Venue to the United States Bankruptcy Court for the Northern District of Alabama, Southern Division* in the Pennsylvania Bankruptcy Court.

an objection is pending.

Pursuant to section 7.6 of the Plan, the $10 million "pot" is to be disbursed in two distributions: an initial distribution to holders of "allowed claims" less the amount of the Disputed Claims Reserve and a final distribution after all disputed claims are resolved. Section 8.3 of the Plan provides, *inter alia*, that "the Class 5 Trustee will not reserve for any Claims that have been disallowed or expunged by an order of the Bankruptcy Court prior to the Initial Distribution Date." Under that section, claims that are deemed disallowed prior to the initial disbursement date but are subsequently deemed allowed will get no distribution under the Plan.

Apparently unsatisfied with the Court's decision to stay the Summary Judgment Motion (at least until after the June 20, 2005 status conference as provided in the April 28, 2005 Order), the Debtors filed the Motion for Ruling on June 2, 2005. (Proceeding No. 1938) AVCO filed an Objection to the Motion for Ruling on June 16, 2005. (Proceeding No. 1985)

As with all pleadings filed by the Debtors and AVCO in this case, both the Motion for Ruling and the Objection thereto were thoroughly briefed to this Court.[11] Oral arguments were heard by the Court on June 20, 2005 and the matter was taken under advisement.

II. Conclusions of Law

A. Claim and issue preclusion create unique problems when judgment is on appeal

Problems may arise when a judgment which is final for purposes of res judicata is used to render a judgment in a second action. Reversal of the first judgment on appeal creates a

[11] Nearly all of the papers filed in the Pennsylvania removal and transfer litigation were submitted to this Court as exhibits to either the Motion for Ruling and AVCO's Objection.

problem with the second, dependant judgment. The potential for such a problem is present in this case.

To avoid this problem a leading treatise advises that "ordinarily it is better to avoid the res judicata question by dismissing the second action or staying trial and perhaps pretrial proceedings pending resolution of the appeal in the first action." See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2005). It further notes that despite the general rule of preclusion while a judgment is on appeal, "strong reasons must be found to justify proceeding with the second action pending appeal from the first judgment." Id. Similarly, Restatement (Second) of Judgments § 16 provides

> it may ... be advisable for the court that is being asked to apply the judgment as res judicata to stay its own proceedings to await the ultimate disposition of the judgment in the trial court or on appeal. This course commends itself if the disposition will not be long delayed and especially if there is substantial doubt whether the judgment will be upheld.

Restatement (Second) of Judgments § 16 cmt. b. By staying litigation to which res judicata or collateral estoppel may technically be applicable courts have attempted to avoid potential problems which may arise by basing a judgment upon an earlier judgment which is subsequently set aside, reversed on appeal or otherwise nullified. See Superior Oil Co. v. City of Port Arthur, 535 F. Supp. 916 (E.D. Tex. 1982). Such a stay should be imposed, however, only after a careful and reasoned analysis by the court and after weighing competing interests of the parties. See, generally, Landis, 299 U.S. at 255.

The seminal Fifth Circuit case on this issue is Ray v. Halsey, 214 F.2d 366 (5th Cir.

1954).[12] In Ray, a state court judgment was entered for defendants in a car wreck case. The plaintiffs appealed. There was a parallel case filed in federal court (for statute of limitations purposes if the state court judgment was reversed) the day after entry of judgment in state court. The defendants moved to dismiss the federal case based on the state court judgment. The District Court granted the motion and dismissed the case. The Fifth Circuit reversed, holding

> [i]t may be that irrespective of whether the judgment in the state court operated as res judicata pending appeal, the federal court should take into consideration the possibility of a reversal of that judgment ... and should mould its orders and judgment so as to avoid any conflict of jurisdiction and to accomplish substantial justice. The federal court may properly stay proceedings before it until a final termination of the proceedings in the state court

Id. at 368. The case was remanded with instructions to stay the litigation pending the outcome of the state court appeal.

The Fifth Circuit reaffirmed its holding in Ray later that year in Occidental Life Ins. Co. v. Nichols, 216 F.2d 839 (5th Cir. 1954), a case from the United States District Court for the Northern District of Alabama. Occidental involved a state lawsuit by Nichols against Occidental claiming disability benefits and a federal lawsuit by Occidental against Nichols for declaratory judgment and rescission of the insurance contract upon which the state court lawsuit was based. The District Court granted Nichols' motion to dismiss the declaratory judgment and rescission action. Occidental appealed the dismissal of its federal lawsuit. In the meantime, a state court judgment was entered for Nichols against Occidental. Occidental appealed the state court judgment. Thereafter, Nichols filed a motion to dismiss Occidental's federal appeal or, in the

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[12] All Fifth Circuit decisions released prior to September 30, 1981 were adopted as binding precedent in the Eleventh Circuit by Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

alternative, that Occidental's appeal was moot and barred by res judicata based on the state court judgment.

The Fifth Circuit reversed the dismissal of Occidental's declaratory judgment and rescission action and remanded the cause with directions to stay further proceedings until a final disposition of the state court proceedings was reached, at which time the District Court could "consider what effect that case will have as res adjucata on the issues." Id. at 842. Nichols' motion to dismiss was also denied.

The Fifth Circuit again addressed this issue in PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973). PPG involved dueling declaratory judgment actions, one filed by PPG in a Louisiana federal district court and the other filed by Continental Oil ("Conoco") in a Texas state court. The Louisiana district court stayed the action pending the outcome of the Texas litigation. PPG appealed. The Fifth Circuit affirmed the District Court's decision to stay the litigation and, citing Ray and Occidental, held that "a federal district court has the discretionary power to stay its hand pending the outcome of a parallel state action." PPG, 478 at 681.

Even where all conditions for the application of res judicata are met, some courts have deferred ruling where the parallel state case is pending on appeal. The court in Superior Oil Co. v. City of Port Arthur, 535 F. Supp. 916, 921 (E.D. Tex. 1982) acknowledged that "[u]nder federal doctrine [of res judicata], the Superior Oil state suit judgment is res judicata for this suit." Id. at 921. However, the court refused to dismiss the suit; rather, it ordered the suit be "stayed as currently barred under the federal doctrine of res judicata until the termination of the parallel

proceedings." Id. In reaching its decision, the court reasoned

> Ordinarily, the determination that a suit is barred by res judicata requires a dismissal. Since, however, the Superior Oil state suit is pending on appeal and the possibility of reversal exists, the appropriate action of this Court is to stay this proceeding until final resolution of the state suit is achieved. Glen Oaks Utilities, Inc. v. City of Houston, 280 F.2d 330, 334 (5th Cir. 1960)("[s]ince appeal was pending from the state court judgment it would have been improper to dismiss the federal action on the ground of res judicata, but it was proper that the proceedings in the federal court be stayed until the final termination of the proceedings in the state court."); Occidental Life Ins. Co. v. Nichols, 216 F.2d 839 (5th Cir. 1954); Ray v. Hasley, 214 F.2d 366 (5th Cir. 1954). Therefore, other issues raised by the parties need not be examined by this Court at this time.
>
> Although res judicata is technically applicable, this doctrine is flexible. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422-423, 84 S.Ct. 461, 468-469, 11 L.Ed. 2d 440 (1964). The Court does not decide today if this suit warrants a departure from the technical application of res judicata. The circumstances of this case may well require the doctrine of res judicata to yield in the interests of justice to the compelling need for remedy of this constitutional violation.

Superior Oil, 535 F. Supp at 921.

A number of other courts have followed the Fifth Circuit's Ray decision and its progeny. See, e.g., Cruz v. Melecio, 204 F.3d 14 (1st Cir. 2000); Ollie v. Riggin, 848 F.2d 1016 (9th Cir. 1988); Bailey v. Ness, 733 F.2d 279 (3d Cir. 1984); Ystueta v. Parris, 486 F.Supp. 127 (N.D. Ga 1980).

B. The Debtors' Motion for Partial Summary Judgment and Objection to Claim are due to be stayed pending the outcome of the Texas appeal(s)

The Court's position on this matter is known to all parties involved. At the April 25, 2005 hearing the Court expressed its inclination to stay the claims litigation indefinitely while the Texas Judgment was on appeal. The Court's April 28, 2005 Order and Notice of Hearing did just that. In a separate Order on AVCO's 3018 Motion entered by this Court on May 5, 2005, the Court wrote

> This Court has in a separate Order continued the Debtors' *Motion for Partial Summary Judgment* and other related matters. Although this Court believes that the Texas Judgment may be entitled to be used by the Debtors to disallow AVCO's claims, the Court voiced its concern at the hearing as to the duplicity of judicial resources. If this Court rules on the summary judgment in favor of the Debtors based upon the Texas Judgment, then that Order will likely be appealed and two appeals may proceed simultaneously, both dependant upon the Texas Judgment which may or may not be affirmed.

In re Citation Corp., et al., No. 04-8130, Proc. No. 1698 (Bankr. N.D. Ala. May 5, 2005)(Order on AVCO's 3018(a) Motion). The concerns expressed by the Court during and after the April 25 hearing are still present. Although, in the Court's opinion nothing has changed to warrant a reconsideration of its previously issued stay of the claims litigation, the Court will more thoroughly explain the rationale behind its decision.

1. This Court has carefully considered the effects of staying the claims litigation.

This Court's decision to stay or rule on the pending claims litigation between the Debtors and AVCO will impact both this and other courts. In considering the Debtors' Motion to Rule, the Court considered the effect of staying the litigation, or conversely, of moving forward with the litigation. The Court discusses the effects of below.

i. Likelihood of numerous appeals

The likelihood of appeals exists regardless of the Court's decision on further staying the claims litigation. However, the number of likely appeals significantly increases if the Courts decides to proceed with the claims litigation. Any appeal from this Court's decision would first go to the United States District Court for the Northern District of Alabama and then possibly to

the United States Court of Appeals for the Eleventh Circuit.[13] This two-tiered appeals process is costly and time consuming both for the litigants and the courts.

If the Court denies the Debtor's *Motion for Ruling* and further stays the claims litigation the Debtors are likely to appeal the decision. Thus, a two-tiered appeal, both costly and timely, is likely. However, this appeal would, in this Court's view, be limited to the issue of whether the stay is appropriate and the resources required would be less than an appeal from an order granting summary judgment.

On the other hand, the Court's decision to proceed with the claims litigation, either by way of Summary Judgment or by a full trial on the merits of the Objection to Claim or the 502 Motion has the potential to result in various appeals: an appeal of the Court's decision to proceed with litigation, an appeal of the Court's Summary Judgment decision, an appeal of the Court's decision on the Objection to Claim and finally an appeal on the Court's estimation of claim on the 502 Motion. Each of these appeals could potentially involve the above described two-tiered appeal process and could ultimately land back in this Court only to start over from scratch.

Proceeding with the claims litigation at this point almost certainly ensures this litigation will be ensnared in federal appeals for many years, unnecessarily clogging the courts' calendars. Therefore, this factor weighs heavily in favor of staying the litigation.

ii. Impact of the reversal of the Texas Judgment

The Texas Judgment is presently on appeal in Texas. Based on representations made by

[13] Appellants may also seek final review by the Supreme Court of the United States but the chances of certoria being granted are so slim the Court has not included that as a factor in its analysis.

counsel, the Texas appeals process may last anywhere from two to four years. That is, it may take less time to reach a final, non-appealable judgment in Texas than to resolve the multiple appeals described above.

The possibility that the Texas Judgment may be reversed on appeal is a major concern to this Court. The Debtors seek a final determination of their *Objection to Claim* (either by summary judgment or trial) based on the preclusive effect of the Texas Judgment. However, if the Texas Judgment is reversed and this Court has disallowed AVCO's claim based on that judgment it will be difficult, if not impossible, to undo the harm done to AVCO. Simply setting aside this Court's Order and allowing AVCO's claims will not right the wrong. If the initial distribution to Class 5 unsecured creditors is made after AVCO's claims are disallowed, AVCO will recover nothing under the Plan even if the Texas Judgment is subsequently reversed and AVCO's claims are allowed.[14]

This is precisely the type of situation in which "it is better to avoid the res judicata question by ... staying trial and perhaps pretrial proceedings pending resolution of the appeal in the first action." See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2005). To do otherwise might result in an irreparable injustice to AVCO.[15]

If, on the other hand, the Texas Judgment is affirmed on appeal, the claims litigation will

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[14] The Court acknowledges that AVCO's pro rata share of the $10 million Class 5 "pot" is minimal compared to its two other combined claims of $170 million.

[15] This reasoning is analogous to that used by other courts in staying (rather than dismissing) parallel federal litigation (or state litigation, as the case may be) where the litigant may be prevented from refiling because the statute of limitations expired if the action is dismissed. Prematurely disallowing the claims would likely bar AVCO from recovery under the Plan if the Texas Judgment is reversed.

be revived and the Court will make a determination on the merits of the Summary Judgment Motion in light of the final, unappealable Texas Judgment.

iii. Effect of staying the claims litigation on lawsuits pending in other courts

The continued stay of the claims litigation in this Court will have no appreciable effect on lawsuits pending in other courts. If the Pennsylvania lawsuit is remanded to the Pennsylvania state court (or even if the Pennsylvania Bankruptcy Court keeps the lawsuit) both parties are free to proceed in that venue in whatever manner they choose. This Court speculates that the Debtor might pursue a summary judgment in Pennsylvania just as it has done here. In that case, a further stay by this Court will have no impact. Should the Pennsylvania Bankruptcy Court transfer the Pennsylvania lawsuit to this Court, the lawsuit may be stayed along with the other claims litigation. This may impact the Debtors by delaying an ultimate resolution to the Pennsylvania lawsuit.

The Court is unaware of any recent developments in the Ohio lawsuit and believes its decision in this proceeding will not impact that litigation. Further, to the Court's knowledge, none of the Debtor entities are named in the Florida lawsuit not have been named as a third-party defendant in a related lawsuit. Therefore, a continued stay will not impact either of these lawsuits.

iv. Impact of stay on other Class 5 claimants

While a continued stay of the claims litigation may technically impact Class 5 claimants with allowed claims, as a practical matter they will likely not be permanently, irreversibly or unforseeably affected. As it currently stands, pursuant to the Plan, the Debtors may either delay

the initial distribution to Class 5 claimants until the Objection to AVCO's claims is resolved or make the initial distribution to Class 5 claimants less any reserve set aside for AVCO's claims. In either case, Class 5 claimants will not be happy but they also should not be surprised. The $10 million "pot" is actually a promissory note executed by the Reorganized Debtor from which Class 5 claimants will receive a pro rata equity interest based on the amount of their claim(s). The note matures at the earlier of five (5) years from the Effective Date of the Plan or the date that cash dividends or liquidation preference payments are paid on the New Preferred Stock. Any actual cash payments on the note could potentially be five years away, far longer than the Court foresees an ultimate resolution of the claims litigation.

If the initial distribution is made while the *Objection to Claim* is pending, Class 5 claimants will obviously receive (at least initially) only a portion of what they would receive if AVCO's claims were disallowed. However, based on the clear terms of the Plan, Class 5 claimants knew, or should have known, the effect AVCO's claims could potentially have on recovery of their claims. That is, the actual amount of their pro rata share of $10 million "pot" would likely be uncertain until the AVCO claim was resolved. If AVCO's claims are ultimately disallowed by this Court, the reserve set aside for AVCO will be distributed to the Class 5 claimants. If, on the other hand, the AVCO claim is ultimately allowed, the distribution to other Class 5 claimants will be diluted by the distribution to AVCO.

Alternatively, the Debtor may choose to defer the initial distribution on allowed Class 5 claims pending resolution of the *Objection to Claim*. Although doing so may delay distribution to Class 5 claimants, it would give those claimants a clearer picture of where they stand.

Therefore, although the Court finds there is an adverse impact on the Class 5 claimants by staying the claims litigation, it was foreseeable, in fact likely, and not substantial.

2. Power of this Court to control its docket

A bankruptcy court, as does any court, has the inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254-255, 57 S.Ct. 163, 165-66, 81 L.Ed. 153 (1936). Incidental to this power is a court's power to stay proceedings on its own docket. Id. How best to control the court's docket is a matter of judicial discretion. See Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1, 21 n.23 (1983)(citing Landis). Thus, this Court's power to stay Citation's *Motion for Partial Judgment on Debtors' Objection to Claim* pending the outcome of the Texas appeal(s) is unquestioned. This Court has weighed the pros and cons of staying the litigation and finds that staying the litigation substantially limits federal judicial resources.

Therefore, for the foregoing reasons and this Court's inherent power to control its own docket, the Debtor's *Motion for Ruling on Debtors' Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* is **DENIED**.

It is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1.) The Debtors' *Motion for Ruling on Debtors' Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* is **DENIED**; and

2.) The Debtors' *Motion for Partial Summary Judgment on Debtors' Objection to Claims of AVCO Corporation* is **STAYED** pending final resolution of the Texas Judgment; and

3.) The Debtors' *Objection to Proof of Claim of AVCO Corporation* is **STAYED** pending final resolution of the Texas Judgment; and

4.) AVCO's *Motion for Estimation of its Claim for Purposes of Allowance Pursuant to 11 U.S.C. 502(c)* is **STAYED** pending final resolution of the Texas Judgment.

Dated this the 5th day of July, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: Michael L. Hall, Attorney for the Debtors
Jesse Vogtle, Attorney for the Claimant

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
SANDRA D. CHAMBERS ,	)	**Case No. 04-6959-TOM-7**
	)	
Debtor.	)	

SANDRA D. CHAMBERS,	)	
	)	
Plaintiff	)	**A.P. No. 04-00166**
	)	
vs.	)	
	)	
FLORIDA DEPARTMENT OF EDUCATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding is before the Court following a trial on August 1, 2005, on the Debtor's adversary proceeding to determine the dischargeability of student loans pursuant to 11 USC section 523(a)(8) filed by the pro se Debtor / Plaintiff, Sandra D. Chambers ("Ms. Chambers" or "Debtor"). Appearing at the trial were: Ms. Chambers, the Plaintiff; Pamela Lutton-Shields, attorney for the Defendant, the Florida Department of Education ("FDOE"); and Jim Chambers ("Mr. Chambers"), Ms. Chambers' husband and witness for the Debtor. The Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and the United States District Court for the Northern District of Alabama's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).[2]

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[1] 28 U.S.C. § 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute

Ms. Chambers filed this individual Chapter 7 case on August 10, 2004.[3] She then filed this adversary proceeding on September 10, 2004 to determine the dischargeability of certain student loan obligations to the FDOE. She received a chapter 7 discharge on January 11, 2005.

The Court has considered the pleadings, the arguments of counsel and Ms. Chambers, briefs

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a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The General Order of Reference as amended provides:

The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2)(I) provides:

(b)(2)Core proceedings include, but are not limited to–

(I) determinations as to the dischargeability of particular debts;

[3] Schedule I does not list her husband's income because Ms. Chambers testified that she and her husband have been separated on and off again on numerous occasions. Apparently, there is no formal separation agreement and she and her husband currently are living together.

submitted, the testimony, the evidence admitted and the law and finds and concludes as follows.[4]

I. FINDINGS OF FACT[5]

A. Loan Information

Between 1989 and 1992, when Ms. Chambers was in her early 50's, she signed promissory notes totaling $13,363.00 for four student loans (collectively the "Loans")[6]. See Stipulated Facts. The loan proceeds were used to assist her daughter with her living expenses and books while she was enrolled in nursing school at the University of Alabama. The initial repayment period on the Loans was 10 years, but they were deferred or placed in forebearance until late-1997. Id.

During the entire repayment period Ms. Chambers has made only one payment of $57.39. Id. As of August 1, 2005, the total owed on the Loans was $45,578.79 which included principal and interest of $37,982.33 plus a 20% collection fee of $7,596.47. Id. Interest continues to accrue at a rate of $4.79 per diem.[7] Id. At the present rate of interest, a monthly payment of $565.84 is necessary to pay off the loans in 10 years. Id. Unlike the U.S. Department of Education's William D. Ford Federal Direct Loan Program, no alternative repayment plans are offered by the FDOE.

FDOE is the type entity contemplated under 11 U.S.C. § 528(a)(8). Id. The Loans are an

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[4] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[5] Ms. Chambers and the FDOE submitted *Stipulated Facts* ("*Stipulated Facts*") on July 29, 2005. Some of the facts in this section are taken from the *Stipulated Facts*. Further, pursuant to Fed. R. Evid. 201, this Court may take judicial notice of the contents of its own files. See ITT Rayonier, Inc. v. U.S., 651 F.2d 343 (5th Cir. 1981).

[6] Ms. Chambers was born on February 7, 1938. However, on each of the Loan applications that her date of birth was either "02/07/42" or "02/07/46." See FDOE's Exh. 1.

[7] The Loans have a variable interest rate which is currently 8.53%.

education debt as contemplated under 11 U.S.C. § 523(a)(8). Id. The Loans represent more than 80% of the total debt listed in Ms. Chambers' bankruptcy petition in this case.

B. Personal and Family

Mr. Chambers graduated from the University of Miami in 1975 with a degree in business administration.[8] He and Ms. Chambers married in 1979 and lived in south Florida where Mr. Chambers was employed as a tax preparer and manager with H & R Block for 20 years. He was also a real estate broker and ran his own realty company in south Florida. At some point Mr. Chambers left H & R Block and started his own tax preparation business in south Florida. There was no testimony about Ms. Chambers' employment while she was living in Florida.

Mr. and Ms. Chambers separated in 2000, as they had done on several prior occasions, and Ms. Chambers moved to Birmingham to be closer to her daughter for whose the benefit the student loans were taken, who has been a nurse anesthetist in Birmingham since graduating from the University of Alabama in 1992. She lived with her daughter for six months when she first moved to Birmingham but subsequently moved into her own apartment in Hueytown, Alabama.

Ms. Chambers testified that after moving to Alabama she applied for several jobs but was unable to find a full time position. She took a part time position with Winn Dixie in Hueytown. She is still employed by Winn Dixie although she is concerned about losing her job because of the recent downsizing within the company. She works between 22 and 32 hours per week, although her hours usually increase during the holiday season. Ms. Chambers is currently 67 years old and is unsure how much longer she can continue working.

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[8] There was no testimony about Ms. Chambers' level of education.

In 2003, Mr. Chambers moved to Birmingham and began living with Ms. Chambers.[9] He took a temporary position with Buffalo Rock. Since moving to Alabama, he has continued operating his tax preparation business in Florida and returned to Florida during tax season in 2004 and 2005.

Despite living together in Hueytown since 2003, Ms. Chambers contends that she and her husband are still separated. No written separation agreement was mentioned or offered into evidence.

Ms. Chambers testified that she suffers from several medical problems including Hashimoto's disease (hypothyroidism) which causes her to suffer numbness, fatigue and memory loss. She also suffers neck and back pain from an injury sustained in a automobile accident several years ago. She testified that she has needed dentures for five years but has been unable to afford them. See Debtor's Exh. 10. Similarly, Mr. Chambers testified that he suffers from medical ailments as well, including high blood pressure, arthritis and dental problems. He also testified that he had a heart attack in early-May 2005 and had a tumor removed from his forehead two weeks before this trial. He said he currently takes twelve prescriptions to control his health problems.

Ms. Chambers testified that she drives her daughter's 1993 Honda which may need to be replaced with a more reliable vehicle soon.

C. Income and Expenses

Ms. Chambers testified that her monthly income is $1,611.00 although her Schedule I reflects

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[9] Although there was contradictory testimony about Mr. Chambers' move to Alabama, the Court finds that he moved here in 2003 and has lived here continuously, other than trips to Florida during tax season, since that time.

Ms. Chambers testified that Mr. Chambers moved to Birmingham in 2003 "because he was out of work and sick with diabetes." She later testified that he moved here in 2004 to help with her bankruptcy.

a monthly income of $1,231.00. However, between June 2003 and December 2004, monthly deposits into Ms. Chambers bank account averaged over $2,000.00. FDOE Exh 3. She testified that she receives $697.00 in social security but did not testify about her earnings from Winn Dixie.

According to Schedule J, Ms. Chambers' monthly expenses total $1,480.00 which includes two monthly credit card payments of $230.00.[10] Since these credit card debts were discharged in this case they should not have been included in Ms. Chambers' monthly expenses.[11] The following chart summarizes her expenses as listed on Schedule J:

	Monthly expenses based on Schedule J
Rent	$390.00
Electricity / Heat	$100.00
Telephone	$100.00
Credit Cards	$230.00
Food	$200.00
Clothing	$32.00
Laundry / Dry Cleaning	$30.00
Medical / Dental Expenses	$50.00
Transportation	$50.00
Recreation	$20.00
Health Insurance	$48.00

[10] The Court believes Ms. Chambers made a clerical error and listed the credit card payment twice.

[11] Based on the remainder of Schedule J, Ms. Chambers' monthly expenses are $1,020.00. However, because the FDOE did not raise this issue prior to or at trial the Court will use only the expense figures provided in Ms. Chambers' petition and testimony.

Other Credit Cards	$230.00
Total Monthly Expenses	**$1,480.00**

At trial, Ms. Chambers testified that her monthly expenses were $1,677.00. However, she offered few details about how she reached that number and the FDOE did not fully explore her monthly expenses. Ms. Chambers' apartment is equipped with two telephone lines, one for her and one for Mr. Chambers to use for his business. She testified that her monthly telephone bill is $98.00, although she sometimes pays for Mr. Chambers' telephone line which is an additional $77.00 per month. According to her testimony her other monthly expenses include: $69.00 for cable, $40.00 for gasoline, $100.00 for laundry. She did not testify about any other expenses.

After Ms. Chambers moved to Alabama her daughter took out a term life insurance policy for her. According to Ms. Chambers' testimony and bank statements, her daughter transfers $100.00 each month into her bank account to pay the monthly insurance premium. See FDOE Exh. 3. She also testified, and bank records show, that her daughter occasionally made small cash "loans" ($20.00 or $30.00) to her and advanced her $390.00 on several occasions. See Id. She testified that she repaid these "loans" but neither bank records nor testimony show any transfers back to her daughter. See Id.

Although Mr. Chambers testified that he does not provide regular financial assistance to Ms. Chambers, Ms. Chambers testified that she has occasionally received money from him for bills and other expenses. Mr. Chambers testified that his only income is $675.00 per month in social security in addition to what he makes during tax season, which, in 2004, was between $8,000.00 and

$9,000.00.[12]

D. The California property and bankruptcy cases

In 1981, Ms. Chambers was left an interest in a home in California (the "California Property") when her father passed away. There was apparently a dispute and prolonged litigation over title to the California Property but that problem seems to have been resolved.[13] According to Mr. Chambers, the California Property is now titled to him and Ms. Chambers jointly.

In 1997, Mr. and Ms. Chambers filed a pro se joint chapter 7 bankruptcy in Florida (the "Florida case"). Mr. Chambers testified when the Florida case was filed they were both unemployed and "knew that the student loans were going to be coming out of forebearance ... and we were going to have to start paying on them." According to testimony, they received a chapter 7 discharge in February 1998 but converted it to a chapter 13 in 2000 and reconverted it to a chapter 7 later that same year.

Ms. Chambers' one-half interest in the California Property was disclosed in the Florida case, and according to Mr. Chambers' testimony had a current market value at the time of $50,000.00. The California Property was never administered in the Florida Case because of an apparent dispute with the chapter 7 trustee over the use of proceeds that were to be derived from the sale of that property. However, for the purposes of this case, the Chambers' dispute with the Florida trustee is irrelevant other than to show that the California Property was not administered in that case and remains titled to the Chambers.

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[12] Based on the testimony, it appears that Mr. Chambers continues to operate various businesses in south Florida. He maintains a complex web of telephone numbers, voice mail boxes and mailing addresses in that area that is unnecessary for the Court to untangle.

[13] Mr. Chambers testified that Ms. Chambers' aunt had a life estate in the property.

The California Property was disclosed on Schedule A in this case, which noted that Ms. Chambers' one-half interest in the property has a current market value of $100,000.00.

II. CONCLUSIONS OF LAW

Congress' main purpose in enacting the Bankruptcy Code was to ensure the insolvent debtor a fresh start by discharging his prepetition debts. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). In furtherance of Congress' fresh start policy, the Eleventh Circuit has generally construed exceptions to discharge narrowly. Haas v. Internal Revenue Service (In re Haas), 48 F.3d 1153, 1158 (11th Cir. 1995); Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir. 1994). However, 11 U.S.C. § 523(a)(8) specifically provides that only in certain circumstances will education loans extended by or with the aid of a governmental unit or nonprofit institution solely on the basis of the student's future earnings potential be discharged in bankruptcy. Several reasons have been cited to explain why Congress excepted student loans from a discharge in bankruptcy. One source claims that it was in response to "the perceived need to rescue the student loan program from insolvency, and to also prevent abuse of the bankruptcy system by students who finance their higher education through the use of government backed loans, but then file bankruptcy petitions immediately upon graduation even though they may have or will soon obtain well-paying jobs, have few other debts, and have no real extenuating circumstances to justify discharging their educational debt." Green v. Sallie Mae (In re Green), 238 B.R. 727, 732-733 (Bankr. N.D. Ohio 1999) (citing the "Report of the Commission on the Bankruptcy Laws of the United States," H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., Pt. II 140, n.14). Another source claims that Congress enacted 11 U.S.C. § 523(a)(8) to ensure that these kinds of loans could not be discharged by recent graduates who would then pocket all future benefits

derived from their education. Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738 (6th Cir. 1992) (citing H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 466-75 reprinted in 1978 U.S.C.C.A.N. 5787).

However, notwithstanding these policy concerns, Congress also realized that not all student debtors abused the bankruptcy system, and that some student debtors were truly in need of bankruptcy relief. Thus, Congress determined that an absolute bar to the dischargeability of student loan debts would be too harsh and also unnecessary to effectuate the foregoing policy goals. Consequently, unlike other types of debt, such as alimony and child support for which a debtor cannot receive a bankruptcy discharge, Congress permitted student loan debts to be discharged if the debtor could demonstrate extenuating circumstances.

A. Dischargeability

A student loan is not dischargeable "unless excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents."[14] 11 U.S.C.§ 523(a)(8). The creditor bears the initial burden of both proving that a debt is owed and such debt is the type contemplated by § 523(a)(8). Roe v. The Law Unit, et al. (In re Roe), 226 B.R. 258, 268 (Bankr. N.D. Ala. 1998). Once proven, the burden shifts to the debtor to show that repayment of the debt

[14] Section 523(a)(8) provides :

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
>
> > (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

would cause an undue hardship. Id. The appropriate standard of proof for § 523(a)(8) is a preponderance of the evidence. Grogan v. Garner, 498 U. S. 279, 290 (1991).

1. The Debt

Ms. Chambers acknowledged in the *Stipulated Facts* submitted to the Court that she owes the debt to the FDOE, that the FDOE is the type of entity contemplated by § 523(a)(8) and that the Loans are the type contemplated by § 523(a)(8). Therefore, the burden at trial was shifted to Ms. Chambers to prove that repayment of the debt would be an undue hardship.

2. Undue Hardship

The Eleventh Circuit Court of Appeals recently adopted the three part test for proving "undue hardship" that was first articulated by the Second Circuit in Brunner v. New York State Higher Educ. Serv. Corp, 831 F.2d 395 (2d Cir. 1987). Hemar Ins. Corp. of Am. v. Cox (In re Cox), 338 F.3d 1238 (11th Cir. 2003). Quoting Brunner, the Eleventh Circuit stated that

> [to establish "undue hardship," the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Cox, 338 F.3d at 1241. This Court previously used the three part test established in Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. 532, 536-545 (Bankr. E.D. Pa. 1979) when determining undue hardship for student loan dischargeability. However, the Court now uses the Brunner test to conform with the Eleventh Circuit's holding in Cox.

I. First Brunner Factor

The first Brunner factor requires Ms. Chambers to prove that based on her current income and expenses she cannot maintain a "minimal" standard of living for herself if she is forced to repay the student loans.[15] Courts have taken differing views about what constitutes a "minimal" standard of living. Few courts still use the United States Department of Health and Human Services Poverty Guidelines as a "bright line" determination of the minimal standard of living for student loan dischargeability purposes.[16] The Court does not believe that, in most cases, a debtor and his family living at or slightly above the federally defined poverty line is maintaining a "minimal" standard of living. Therefore, this Court rejects the notion that a debtor must fall below the federal poverty line to discharge a student loan.

This Court believes that a more thoughtful, analytical approach should be taken. A minimal standard of living lies somewhere between "poverty and mere difficulty." McLaney v. Kentucky Higher Educ.Assistance Authority (In re McLaney), 314 B.R. 228, 234 (Bankr. M.D. Ala. 2004). The court must examine the debtor's living situation to ensure that the debtor has no unnecessary and frivolous expenses; however, the debtor should not be forced to live in abject poverty with no comforts. Judge Benjamin Cohen best described a minimal standard of living as "a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." Ivory v. United States Dep't. of Educ.

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[15] Because Ms. Chambers maintains that she and her husband are separated the Court considered only Ms. Chambers when calculating the poverty level based on family size.

[16] These guidelines define eligibility for certain government benefits and programs and are designed to assist the needy and economically disadvantaged. According to the 2005 Health and Human Services Poverty Guideline, the poverty level for a family of one is $9,570.00 per year. Federal Register, Vol. 70, No. 33, February 18, 2005, pp. 8373-8375, *available at* http://aspe.hhs.gov/poverty/05poverty.shtml (last visited August 12, 2005.)

(In re Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). Judge Cohen went on to list numerous basic necessities needed to maintain a minimal standard of living:

> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.
> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.
> 3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
> 4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
> 5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
> 6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

Id. Brunner requires that this determination be based on the debtor's current income and expenses, thus the Court must look at the debtor's income and expenses at the time of trial. See Cox, 338 F.3d at 1241.

In this case, Ms. Chambers testified that her monthly income is $1,611.00 and she receives no additional financial support from her husband or daughter. The Court questions the veracity of this testimony especially since monthly deposits into her bank account between June 2003 and December 2004 averaged over $2,000.00 and her husband, with whom she lives, receives a monthly social security check of nearly $700.00.[17] However, the Court will give Ms. Chambers the benefit of the doubt and base its analysis only her stated monthly income of $1,611.00.

[17] If Mr. Chambers receives income from his businesses or other sources was never fully explored at trial.

Ms. Chambers provided the Court with two different monthly expense figures. According to her testimony her monthly expenses are $1,677.00 but she listed monthly expenses of $1,480.00 on Schedule J.[18] Therefore, the Court will perform its analysis under the first Brunner factor using both numbers.

Since no alternative repayment plans are offered by the FDOE, Ms. Chambers' monthly student loan payment will be $565.84. Based on either of the two monthly expense figures provided by Ms. Chambers, she has insufficient excess monthly income to make this student loan payment. According to her scheduled expenses she has $131.00 in excess monthly income. Based on her testimony expenses, her monthly expenses exceed her monthly income by $60.00. Therefore, using either monthly expense amount, Ms. Chambers will be unable to make this student loan payment while also paying her existing monthly expenses.

There was little testimony about Ms. Chambers actual monthly expenses. Based on the testimony and evidence presented the Court does not believe Ms. Chambers' expenses are abnormally high and therefore finds it unnecessary to provide a detailed description of her schedules.

Based on the foregoing, the Court believes that based solely on Ms. Chambers' income (without any assistance from her husband or daughter) she could not maintain a "minimal" standard of living for herself if forced to repay the Loans at this time. Therefore, Ms. Chambers has successfully proven to the Court that she meets the first factor of the Brunner test.

ii. Second Brunner Factor

The second Brunner factor requires the debtor to show additional circumstances indicating

[18] As previously noted the credit card debts included on Schedule J were discharged and should not have been included in Ms. Chambers' current monthly expenses unless she is voluntarily paying them even though she filed this case. See footnote 11 herein.

that his or her state of affairs (that is, his inability to maintain a minimal standard of living if forced to repay the student loans) is "likely to persist for a significant portion of the repayment period." Brunner, 831 F.2d at 396. These circumstances must demonstrate a "certainty of hopelessness, not simply a present inability to fulfill financial commitment." Nys v. Educ. Credit Mgmt., Corp. (In re Nys), 308 B.R. 436, 443 (B.A.P. 9th Cir. 2004). See also Cox, 338 F.3d at 1242. While there is no definitive list of what are considered "additional circumstances," they may include:

> 1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement;
> 2. The debtor's obligations to care for dependents;
> 3. Lack of, or severely limited education;
> 4. Poor quality of education;
> 5. Lack of usable or marketable job skills;
> 6. Underemployment;
> 7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
> 8. Limited number of years remaining in work life to allow payment of the loan; Brunner,
> 9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
> 10. Lack of assets, whether or not exempt, which could be used to pay the loan;
> 11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
> 12. Lack of better financial options elsewhere.

In re Nys, 308 at 446-47 (internal citations omitted). Where the debtor is "apparently healthy, presumably intelligent and well-educated, and shows no evidence of extraordinary burdens which would impair further employment prospects" discharge of student loan obligations is inappropriate." Shankwiler v. Natl. Student Loan Marketing, et al. (In re Shankwiler), 288 B.R. 701, 706 (Bankr. C.D. Cal. 1997).

Ms. Chambers is 67 years old and despite some minor medical problems appears to be relatively healthy for her age. Given her age, her current job and her earning potential, it is unlikely

she will see a significant increase in her income over the next ten years, the Loan repayment period.[19] The Court notes, however, the possibility that Ms. Chambers' daughter (for whose benefit the debt was incurred and who is a highly paid medical professional), or her husband (with whom she currently lives) may decide to provide financial assistance to her in the future which would certainly change her financial condition. This is only speculation, though, and the Court has not considered it in making its determination under the second Brunner factor.

Based on the foregoing, the Court finds that Ms. Chambers' financial condition, in so far as it was described to the Court and described previously in this Opinion, is likely to persist for all or at least a significant portion of the ten year Loan repayment period. Therefore, Ms. Chambers has successfully proven to the Court that she meets the second factor of the Brunner test.

iii. Third Brunner Factor

The third Brunner factor requires a showing that the debtor made a good faith effort to repay the student loans. Brunner, 831 F.2d at 396. What is considered a debtor's good faith effort varies widely among courts; however, courts are generally reluctant to find good faith where a debtor made minimal or no payments on his or her student loans. See, e.g., Murphy v. CEO/Manager, Sallie Mae, et al. (In re Murphy), 305 B.R. 780 (Bankr. E.D. Va. 2004)(no good faith where the debtor made no payments on her student loans); Garrett v. New Hampshire Higher Educ. Assistance Found., et al. (In re Garrett), 180 B.R. 358, 364 (Bankr. D.N.H. 1995)(no good faith shown where "[t]he record is devoid of any payment made by [the debtor] on these loans or even any attempt to enter into a repayment schedule with [the lenders]"). Other factors to consider include the amount of the student

[19] It should be noted, however, that Ms. Chambers' has a one-half interest in the California Property that, if sold or mortgaged, would significantly increase her income.

loan debt as a percentage of the debtor's total indebtedness and whether the debtor attempted to find employment. See, e.g., Murphy, 305 B.R. at 798 (citing Hall v. U.S. Dep't. of Educ. (In re Hall), 293 B.R. 731, 737 (Bankr. N.D. Ohio 2002)(citations omitted).

Ms. Chambers argues, *inter alia*, that her diligence in seeking deferments and stays through numerous bankruptcies demonstrates her good faith effort to repay the Loans. The Court disagrees and finds to the contrary. Ms. Chambers, who was in her early-50's when she took the Loans, used deferments and bankruptcies to delay repayment of the Loans for nearly two decades, knowing that the Loans would eventually come due. The loans have finally come due, and Ms. Chambers now seeks sympathy from this Court because of her current situation. A situation that, the Court notes, is completely of her own making and a result of her voluntary deferments of the Loans.

The California Property owned by the Chambers is worth, according to Schedule A, at least $200,00.00. There was no testimony that the house is encumbered by any liens or mortgages. Ms. Chambers cannot argue that she has made a good faith effort to repay her loans while holding an unencumbered asset such as the California Property, especially when that home is not her primary residence. By selling or mortgaging the property Ms. Chambers could repay the Loans in full and satisfy her obligation to the FDOE. Thus, the Court finds that Ms. Chambers has not demonstrated a good faith effort to repay because she failed to use all of her assets, namely the California Property, to repay the Loans.

Further, while seeking deferments may in some cases help to show good faith, there must also be a showing that the Debtor(s) made an effort to make some, even if only partial, payments. That was not the case here. Since the first payment on the Loans came due, Ms. Chambers has made only one, small payment. She offered no testimony about why she made no Loan payments even

when her husband was employed as a tax preparer, and presumably, a realtor in Florida.

Another factor suggesting Ms. Chambers has not made a good faith effort to repay the Loans is that they represent more than 80% of the debts scheduled in this case and were also involved in her prior case(s) in Florida. Further, according to Mr. Chambers' testimony, the Florida Case was filed to avoid, or at least further delay, repayment of the Loans. This use of the bankruptcy system is contrary to the "fresh start" for the "honest but unfortunate debtor" purpose of the Bankruptcy Code. Although neither Mr. nor Ms. Chambers is an attorney, they have proven to the Court that they are well versed in bankruptcy law and have been more than capable in handling this case.

A Debtor may not repeatedly defer or otherwise delay repayment of a student loan and expect the Court to believe doing so demonstrated his or her good faith efforts to repay the loan. That is precisely what Ms. Chambers is asking this Court to do by arguing that the repeated deferments show good faith. Through repeated deferments and bankruptcies she successfully avoided repayment for nearly two decades and now wants to discharge the Loans in part because of her age.

Based on the foregoing, the Court finds that Ms. Chambers has not demonstrated a good faith effort to repay her student loans and has thus failed to satisfy the third element of the Brunner test. Therefore, because Ms. Chambers failed to meet the third Brunner element she has not proven that she will suffer an undue hardship if forced to repay her student loans. Therefore, the Court finds that Ms. Chambers' student loans are not dischargeable under 11 U.S.C. §523(a)(8).

III. CONCLUSION

Discharge of student loan obligations should be limited to only exceptional cases. This is not such a case. Ms. Chambers failed to prove that she will suffer undue hardship if forced to repay her student loan obligations to the FDOE. While the Court can sympathize with Ms. Chambers'

situation it cannot reward her for bringing this very set of circumstances on herself and the Court does not believe the facts of this case warrant a discharge of her student loan debt. Therefore, the Court finds that Ms. Chambers' student loan obligation to the FDOE is not dischargeable under 11 U.S.C. § 523(a)(8). Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Debtor, Sandra Chambers, to declare her student loan debt dischargeable pursuant to 11 U.S.C. § 523(a)(8) is **DENIED.** Accordingly, the balance of Ms. Chambers' student loan debt owed to the Defendant, the Florida Department of Education, is hereby declared to be **NONDISCHARGEABLE**.

Dated this the 16th day of August, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdg

xc: Sandra Chambers, Pro Se Plaintiff
Pamela Lutton-Shields, attorney for the Defendant, the Florida Department of Education

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JAMES SMITH, JR.	)	**Case No. 02-09694-TOM-13**
	)	
Debtor	)	

JAMES SMITH, JR.	)	
	)	**A.P. No. 04-00151**
Plaintiff,	)	
	)	
vs.	)	
	)	
CITIFINANCIAL MORTGAGE COMPANY, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a Motion for Summary Judgment of Defendant Citifinancial Mortgage Company, Inc. ("Motion for Summary Judgment"), filed by Citifinancial Mortgage Company, Inc. ("the Movant" or "Citifinancial"). After notice, a final hearing for summary judgment was held on July 21, 2005. Appearing at the hearing were Michael Antonio for the Debtor, James Smith, Jr. ("Debtor" or "Mr. Smith"); Eric J. Breithaupt, attorney for Citifinancial Mortgage Company, Inc.; and Charles King, Assistant Chapter 13 Trustee. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 151, and 157(a) (1994) and the district court's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding

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[1] The General Order of Reference Dated July 16, 1984, As Amended July 17, 1984, issued by the United States District Court for the Northern District of Alabama provides: The general order of reference entered July 16, 1984 is hereby amended to add that

arising under Title 11 of the United States Code as defined in 28 U.S.C. § 157(b)(2)(A), (D) and (O).[2] This Court has considered the Defendant's Motion for Summary Judgment, the Debtor's Motion for Summary Judgment, arguments of counsel and the law and concludes as follows .[3]

I. FINDINGS OF FACT[4]

On or about May 12, 1989, Mr. Smith and his wife, Grace Smith, borrowed $34,642.30 from Associates Financial for the purchase of a home.[5] Debtor and his wife signed a Note and a Real Estate Mortgage ("Mortgage"). Movant's Exhibits A and B. The Mortgage was recorded in the Probate Court of Jefferson County, Alabama, on May 17, 1989.

Between 1992 and 1999, Mr. Smith filed five Chapter 13 bankruptcies in the Northern District of Alabama. See Movant's Exhibits C through G-4. All of Mr. Smith's bankruptcies listed the Mortgage as a secured claim. Id. In each Chapter 13 case, the Plan was confirmed but

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there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2) provides:
(b)(2)Core proceedings include, but are not limited to–
(A) matters concerning the administration of the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death.

[3] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[4]Pursuant to Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of the contents of its own files. See ITT Rayonier, Inc. v. U.S., 651 F.2d 343 (5th Cir Unit B July 1981); Florida v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975).

[5]The original loan was with Associates Financial and Citifinancial is the successor by merger to Associates.

subsequently each case was dismissed due to Mr. Smith's failure or inability to make payments pursuant to the plans. Id.[6]

Mr. Smith's current Chapter 13 case was filed on December 6, 2002, and Schedule D listed Citifinancial's mortgage as a secured claim. Procceeding No. 2. The Chapter 13 Plan proposed to pay Mr. Smith's regular mortgage payments to Citifinancial direct. This plan was confirmed on March 5, 2003. Movant's Exhibit H-1. On November 4, 2003, Citifinancial filed a Motion for Relief from Automatic Stay ("Motion for Relief") because Mr. Smith was not making his regular monthly mortgage payments. Proceeding No. 9. In support of its Motion for Relief, Citifinancial filed an Affidavit of Pamila Turley, listing Smith's mortgage balance as of October 20, 2003, to be $28,393.06. Movant's Exhibit I. On November 24, 2003, the Motion for Relief was denied, conditioned upon Mr. Smith resuming his regular monthly payments to Citifinancial. Movant's Exhibit I-1. Citifinancial was allowed to file a claim for the post-petition arrearage amounting to $1,450.00. Id.

Mr. Smith received a letter from Citifinancial dated December 24, 2003, indicating that his account was paid in full. Movant's Exhibit J. On January 6, 2004, Citifinancial filed a $1,450.00 claim for post-petition arrearage. See Movant's Exhibit I-1. Mr. Smith filed an objection to Citifinancial's arrearage claim on March 15, 2004, arguing it was paid in full. See Movant's Exhibit L. No response to the objection to claim was filed and no one appeared for Citifinancial at the hearing on the objection to claim. On May 4, 2004, this Court entered an order sustaining Mr. Smith's objection to Citifinancial's claim for $1,450.00. Debtor's Exhibit K. Citifinancial recorded

[6]The fifth Chapter 13 case, filed on October 22, 1999, was converted to Chapter 7 and subsequently discharged on December 2, 2002. See Movant's Exhibits G, G-2 and G-4.

the "Discharge of Mortgage" May 20, 2004, in the Probate Court of Jefferson County. Debtor's Exhibit I. Citifinancial claims the notice and recording of the satisfaction of Mr. Smith's Mortgage was the result of clerical error. Mr. Smith filed this adversary proceeding on August 30, 2004, to compel Citifinancial to release the Mortgage. Proceeding No. 1. In response, Citifinancial filed a counterclaim for declaratory judgment that the Mortgage was valid and alleged that Mr. Smith has failed to provide any proof of payment.

On February 9, 2005, Mr. Smith filed a Motion to Dismiss the Adversary Proceeding on grounds that the Complaint was moot due to the recorded "Discharge of Mortgage." Proceeding No. 28. This Court granted Mr. Smith's motion to dismiss his complaint on March 9, 2005, but allowed Citifinancial's counterclaim for declaratory judgment to proceed. Proceeding No. 34. Citifinancial moved for summary judgment on June 3, 2005. Proceeding No. 55. The Movant contends that Mr. Smith should be judicially estopped from asserting the loan as paid in full and that due to a mistaken satisfaction the Mortgage should be declared valid and reinstated.

II. CONCLUSIONS OF LAW

A. Summary Judgment

Summary judgment is only appropriate if no genuine issue as to any material fact exists and if the movant is entitled to a judgment as a matter of law. FED. R. BANKR. P. 7056.[7] Substantive law concludes which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477

[7] This rule incorporates into the rules governing adversary proceedings without modification Rule 56 of the Federal Rules of Civil Procedure.

FED. R. CIV. P. 56(c) states in part: "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact ...[then] the moving party is entitled to summary judgment as a matter of law."

U.S. 242, 248, 106 S. Ct. 2505 (1986). In determining material facts, the court considers those facts that are outcome determinative. Id. Mere allegations of factual disputes are not enough to defeat "an otherwise properly supported motion for summary judgment." Id. at 247-48. Rather, there must be "no genuine issue of material fact." Id. at 248. The judge does not determine the truth or weigh the evidence, but identifies if there exists "a genuine issue for trial." Id. at 249. The party moving for summary judgment has the burden of demonstrating that these conditions have been met. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The court, in determining whether the movant has met their burden of proof, must consider "the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party." Allen v. Tyson Foods, Inc. 121 F.3d 642, 646 (11th Cir. 1997).[8] "'If reasonable minds could differ on inferences arising from undisputed facts, then a court should deny summary judgment.'" Id.[9] Only when the movant satisfies its initial burden does the burden shift to the non-movant. Id. at 646. In the instant proceeding, there exist genuine issues of material fact, and this Court will refrain from granting the Defendant's Motion for Summary Judgment.

B. Judicial Estoppel

In its Motion for Summary Judgment, Citifinancial contends that Mr. Smith should be judicially estopped from asserting that the Mortgage is paid in full. "Judicial estoppel is an equitable doctrine invoked at a court's discretion." New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct.

[8]See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598 (1986); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

[9]See Miranda v. B & B Cash Grocery Store Inc., 975 F.2d 1518 (11th Cir. 1992) (citing Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985).

1808 (2001).[10] The doctrine is intended to prevent parties from alleging inconsistent positions in legal proceedings. Burnes, 291 F.3d at 1285. Judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to exigencies of the moment." Id. The Supreme Court acknowledged that when to invoke judicial estoppel is not "reducible to any general formulation of principle." New Hampshire, 532 U.S. at 750. The Eleventh Circuit adopted a two-part test to determine whether judicial estoppel applies. Salomon Smith Barney, Inc. v. Harvey, M.D., 260 F.3d 1302, 1308 (11th Cir. 2001).[11] First, "allegedly inconsistent positions" must be shown to have been made "under oath in a prior proceeding." Id. Second, the inconsistencies "must be shown to have been calculated to make a mockery of the judicial system." Id. These two factors are not exhaustive; rather "courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." Burnes, 291 F.3d at 1286. This Court must determine whether the Movant has satisfied its burden of showing that no genuine issue of material fact exists with regard to Mr. Smith's conduct satisfying these two tests.

For the purposes of judicial estoppel, this Court may consider bankruptcy plans as statements

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[10]See Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002).

[11]In New Hampshire, the Supreme Court listed several factors to consider regarding the grant or denial of judicial estoppel. The factors were: 1) whether the present position is "clearly inconsistent" with the earlier position; 2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was mislead; 3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party. 532 U.S. at 750-51. The Eleventh Circuit has held its two factors are consistent with those set forth by the Supreme Court and "provide[s] courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case." Burnes, 291 F.3d at 1285-86.

under oath. See Burnes, *supra*, at 1285; In re Higgins, 305 B.R. 63, 66 (Bankr. N.D. Ala. 2003). On May 12, 1989, Mr. Smith and his wife signed a Note in the amount of $34,642.30 to purchase real property in Jefferson County. His previous bankruptcy cases listed Citifinancial's mortgage as a secured claim in the schedules and plans. Mr. Smith's current Chapter 13 case, filed December 6, 2002, also listed the Mortgage as a secured claim in the schedules. This Court confirmed his Chapter 13 Plan on March 5, 2003.

In this case, as in his prior cases, Mr. Smith has treated Citifinancial as a secured obligation. He has shown a debt to Citifinancial and not ever suggested that he has paid them in full or that they have been paid from any other source. However, on December 24, 2004, Citifinancial mailed a letter to Mr. Smith notifying him the Mortgage was satisfied. Several weeks later on January 6, 2004, Citifinancial filed a $1,450.00 post-petition arrearage claim. Due to the Movant's notice concerning the payoff of the mortgage, Mr. Smith objected to Citifinancial's claim for post-petition arrearage. On May 4, 2004, this Court sustained Mr. Smith's objection to the post-petition arrearage, based on the alleged Mortgage satisfaction. Citifinancial proceeded to record the "Discharge of Mortgage" on May 20, 2004. Mr. Smith filed this adversary proceeding on August 30, 2004, to compel Citifinancial to release the deed and mortgage.

Citifinancial contends Mr. Smith's recent challenges to the existence of the Mortgage following its notice and recording of the "Discharge of Mortgage" are inconsistent pleadings for the purposes of judicial estoppel. The Movant further argues that Mr. Smith consistently acknowledged his indebtedness to Citifinancial throughout all his bankruptcy proceedings and to now assert that he owes nothing is inconsistent. However, it was only when Citifinancial mailed him notice of the paid off Mortgage that Mr. Smith began to dispute his indebtedness to the Movant. The Movant's

notice and recording of the "Discharge of Mortgage" led Mr. Smith to file pleadings that appear to be inconsistent with the original schedules. The acts of Citifinancial occurred before the alleged inconsistent pleadings and it appears those acts caused the later documents to be asserted by Mr. Smith. No opportunity has been afforded Mr. Smith to explain his position and the Court finds there is a genuine issue of material fact as to whether there have really been inconsistent positions taken by the Debtor.

The second element that Movant must show for judicial estoppel to be applicable is that Mr. Smith calculated his inconsistencies to "make a mockery of the judicial system." Harvey, *supra*. This second element looks at intent. Judicial estoppel applies to "intentional contradictions, not simple error or inadvertence." Burnes, 291 F.3d at 1286. Such deliberate actions or intent may be inferred from the record. Id. at 1287. The evidence before this Court does not support a finding that Mr. Smith manipulated his position so as to mock the judicial system. It appears that Mr. Smith reacted to conduct by Citifinancial. Admittedly, his reactions were to his benefit and to the detriment of Citifinancial but it does not appear that Mr. Smith intended to manipulate the system.

Mr. Smith consistently accounted for his indebtedness to Citifinancial, while it was deemed owed. Only upon notice of the mortgage satisfaction did Mr. Smith change his position. Citifinancial contends Mr. Smith offered no proof of payment and that the notice and recording of the Mortgage discharge resulted from clerical error. This may be true, but Citifinancial has not met its burden of proof for summary judgment. Filed with its Motion for Relief on October 20, 2003, Citifinancial submitted the affidavit of Pamela Turley concerning the mortgage amount.[12] No other evidence has come from the Movant to prove the existence of the Mortgage since the notice of payment to Mr.

[12]At that time, Ms. Turley attested the amount owed was $28,393.06.

Smith. Citifinancial offered no evidence of its alleged clerical error. The evidence before this Court does not indicate Mr. Smith "deliberately took inconsistent positions to gain an unfair advantage." Id. at 1286. Actually, it appears that Mr. Smith's present position is due to Citifinancial's notice and recording of the "Discharge of Mortgage."

C. Reinstatement of the Mortgage under Alabama Law

In its Motion for Summary Judgment, Citifinancial also contends that the Mortgage should be reinstated under Alabama law due to its satisfaction or cancellation by clerical error. The Movant asserts that it is entitled to a declaratory judgment reinstating the Mortgage and declaring the instrument valid.

In bankruptcy proceedings, property interests are determined by the law of the state where the real property is located. Butner v. U.S., 440 U.S. 48, 55, 99 S. Ct. 914 (1979).[13] Alabama law allows reinstatement of an erroneously satisfied mortgage only if the rights of innocent third parties have *not* been affected. See HAAS, 31 F.3d at 1086.[14] First, the Movant has merely alleged the notice of mortgage satisfaction and its recording was the result of clerical error. No evidence is before the Court which proves that these actions were in fact "clerical error." Second, Citifinancial has not offered to the Court any evidence to show whether any third parties have relied on the recorded "Discharge of Mortgage." Therefore, the Court finds there are genuine issues of material fact and summary judgment should be denied.

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[13]See HAAS v. Internal Revenue Service, 31 F.3d 1081 (11th Cir. 1994).

[14]Citing Lacey v. Pearce, 191 Ala. 258, 68 So. 46 (1915).

III. CONCLUSION[15]

Based on these findings and conclusions, the Court finds that the Movant's Motion is due to be **DENIED**.

Accordingly, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment of the Defendant Citifinancial Mortgage Company, Inc. is **DENIED**.

It is further **ORDERED** that the parties and their counsel shall participate in a mediation with J. Thomas Corbett and complete the mediation on or before October 28, 2005 and the Court will hold a status conference on October 31, 2005, at 10:30 a.m. in Courtroom 2.

Done this 8th day of September, 2005.

/s/ Tamara O. Mitchell
Tamara O. Mitchell
United States Bankruptcy Judge

TOM:eaj

cc: Michael Antonio, Attorney for Debtor
Eric J. Breithaupt, Attorney for Movant
Citifinancial Mortgage Company, Inc., Movant
Charles King, Assistant Chapter 13 Trustee
J. Thomas Corbett, Chief Deputy Bankruptcy Administrator

[15] The Court notes for the parties that as a practical matter there are other issues to be resolved. First, no challenge to the Order on the Objection to Claim was timely filed. What impact if any does that have on this proceeding? Further, if the lien is valid and Mr. Smith is not paying his mortgage or the arrearage, where will he be with respect to that mortgage?

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ROBERT H. HORNSBY and RICHARD R. RANDOLPH	)	**Case No. 04-07840-TOM13**
Plaintiff/Creditor,	)	
vs.	)	
	)	
TIMOTHY FLOWERS	)	
Defendant/Debtor.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a Motion for Relief from the Automatic Stay ("Motion for Relief"), filed by Richard R. Randolph and Robert H. Hornsby ("the Movants" or "the Plaintiffs"). After notice, a final hearing for relief from stay was held on August 18, 2005. Appearing at the hearing were Cindee Dale Holmes, attorney for the Debtor, Timothy Flowers, Jr.("Debtor"); Henry Taliaferro, attorney for Richard R. Randolph and Robert H. Hornsby; and Charles King, Assistant Chapter 13 Trustee. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 151, and 157(a) (1994) and the district court's General Order Of Reference Dated July 16, 1984, As Amended July 17, 1984.[1] This is a core proceeding arising under Title 11 of the United States Code as defined in 28 U.S.C. § 157(b)(2)(G).[2] The Court in this matter must decide

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[1] The General Order of Reference Dated July 16, 1984, As Amended July 17, 1984, issued by the United States District Court for the Northern District of Alabama provides: The general order of reference entered July 16, 1984, is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

[2] 28 U.S.C. § 157(b)(2)(G) provides:
(b)(2) Core proceedings include, but are not limited to--
(G) motions to terminate, annul, or modify the automatic stay[.]

whether Movants should be granted relief from the automatic stay. This Court has considered the pleadings, the arguments of counsel, the testimony,[3] the evidence admitted, and the law, and finds and concludes as follows.[4]

I. Factual Background

The Movants contend that on May 8, 2003, City West Corporation ("City West") purchased the real property located at 1689 Fulton Avenue S.W., Birmingham, Alabama, 35211 (the "Property"). Mr. Flowers and his wife Gloria Flowers signed a Promissory Note dated July 9, 2003, in the amount of $53,500 plus interest to Bobby N. Floyd in return for a Mortgage Deed.[5] Debtor's Ex. 3 and 6. Mr. Flowers testified that Joel E. Williams gave him the Mortgage Deed. Mr. Flowers and his wife signed two copies of the Mortgage Deed and had them both notarized.[6] Mr. Flowers testified that he personally recorded his Mortgage Deed in the Probate Court of Jefferson County, Alabama, on November 13, 2003. See Debtor's Ex. 3. A Tax Assessment of the Property lists the owners as Timothy and Gloria Flowers as of November 23, 2003. Debtor's Ex. 5.

Mr. Randolph testified that in August 2003, he and City West each purchased a one-half

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[3] This Court takes judicial notice of certain facts from its file in the main case. Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of the contents of its own files. See ITT Rayonier, Inc. v. U.S., 651 F.2d 343 (11th Cir. 1981).

[4] This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

[5] Although titled as a "Mortgage Deed" the language of the instrument indicates it may be a mortgage only. Mr. Flowers maintained at trial that this was his deed to the property. Pursuant to this mortgage, he testified he made payments to Bobby Floyd, Joel E. Williams, and to a lady named Doris, who took payments occasionally for Mr. Williams.

[6] Mr. Flowers testified that he kept one copy of the Mortgage Deed and Mr. Williams kept the other.

interest in the Property from City West for $211,000. See Movant's Ex. 2.[7] The deed was recorded the next day in the Probate Court for Jefferson County, Alabama. Movant's Ex. 2.[8] In April 2005, City West conveyed its one-half interest in the Property to Robert H. Hornsby. Movant's Ex. 3.[9] In their Motion for Relief, the Movants contend the Debtor occupied the property at the time of their purchase. Proceeding No. 59. The Movants allege that they allowed the Debtor to remain on the property without a written lease and the Debtor made sporadic monthly payments to them. Id. The Debtor offered receipts of payment into evidence, showing his payments on the mortgage to City West in 2003 and 2004.[10] Debtor's Ex. 1 and 2.

The Debtor filed this voluntary petition for Chapter 13 on September 7, 2004. Proceeding No. 1.[11] The Debtor filed a Chapter 13 Plan ("the Plan") Summary along with his Schedules on September 24, 2004. Proceeding No. 18 and 20. The Plan Summary proposed direct monthly payments to City West on the long-term debt of $60,000. Id. Schedule A showed the Debtor's interest in the Property and lists the current market value of the Property as $53,500, the amount of

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[7]First Financial Bank held a mortgage on the property in the principal amount of $211,000. Movant's Ex. 1.

[8]The title insurance policy shows that City West and Mr. Randolph held a fee simple interest in the Property on August 21, 2003.

[9]The title insurance as of April 12, 2005, reflected that Mr. Randolph and Mr. Hornsby owned the Property in fee simple.

[10]Debtor's Ex. 1 is three receipts of payment on the Property for 2003. Two of the receipts are directly from City West Corp.; one receipt is from Joel E. Williams.

Debtor's Ex. 2 is five receipts of payment on the property for 2004, each from City West Corp.

[11]This Court takes judicial notice of the Chapter 13 Standing Trustee's Interim Statement and the Court's records which show that the Debtor has previously filed 13 other bankruptcies.

City West's secured claim. Proceeding No. 18. Schedule J showed Mr. Flowers' current house payment to be $392.57 a month. Movants did not object to the Debtor's Plan. This Court confirmed the Debtor's Plan on March 10, 2005.

Although the Movants contend that no Plan payments have been received for 2005, Mr. Flowers testified that he paid on the Property for January through March of 2005. He offered a copy of one of his checks sent to Jemison Realty Co., Inc. in the amount of $392.57. Debtor's Ex. 4. The Debtor testified that this check had not been cashed, along with other checks he had allegedly sent them, but that he had caught up on the arrearage. Mr. Flowers contends he is only behind three payments for 2005: April, May and June. He testified that due to sickness and unemployment in May, he was not able to stay current on his payments, but that he is presently employed.

On June 22, 2005, the Movants filed a Proof of Claim, noting the basis to be "purchase money mortgage." Claim No. 9. Written above this, the Movants added "rent." Id. There is a dispute over who has an ownership interest in the Property. The Movants contend they have record title to the Property and that Mr. Flowers is a lessee. The Debtor maintains that he and his wife own the Property. The Movants filed this Motion for Relief from the Automatic Stay on July 21, 2005, alleging the Debtor is behind on his payments and seeking relief from the automatic stay to proceed to take possession of the Property.

II. CONCLUSIONS OF LAW

A. The Automatic Stay

The filing of a petition for relief under any chapter of the Bankruptcy Code operates as a stay of certain actions. 11 U.S.C. § 362(a). Typically, the actions stayed are actions by creditors to recover from the debtor property of the debtor, or property of the estate, for a debt that arose prior

to the petition date. "[A] mere possessory interest is sufficient to invoke the protection of the automatic stay." In re Johnson, 16 B.R. 193, 195 (Bankr. M.D. Fla. 1981). In 11 U.S.C. § 541(a)(1), the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." See Central Bank of the South v. Thomas (In re Thomas), 121 B.R. 94, 99 (Bankr. N.D. Ala. 1990).[12] The legal history of 11 U.S.C. § 541(a)(1) suggests "[t]he Debtor's interest in property also includes 'title' to property, which is an interest, just as are a possessory interest or leasehold interest, for example." Id. Also considered in determining adequate possessory interests of property are payments made and received and "unbroken occupation" of the property. Id. at 102.

Mr. and Mrs. Flowers signed a Promissory Note to Mr. Floyd and signed two copies of the Mortgage Deed and had it notarized and recorded. The Property is shown as owned by Mr. and Mrs. Flowers according to the Tax Assessment dated November 23, 2003. Mr. Flowers and his family occupy the Property, have treated it as their own and believe it belongs to them. Since acquiring the Property, he has made payments on the home as shown by his receipts. The Movants dispute that Mr. Flowers owns the Property and they claim title to the Property and contend the Debtor is only a lessee of the Property. However, the Movants' Proof of Claim referred to the claim as "purchase money mortgage" and "rent." So even Movants' claim is inconsistent and inconclusive as to their interest and the interest of the Debtor and his wife. This Court finds that it does not have to decide who has title to resolve the relief from stay. It is undisputed that Mr. and Mrs. Flowers reside in and on this real Property and have for several years. This possessory interest alone entitled them to the

[12]See also United States v. Whiting Pools, Inc., 462 U.S. 198, 204-205, 103 S. Ct. 2309 (1983)("phrase 'all legal and equitable interests of the debtor in property as of the commencement of the case' is to be broadly construed").

protection of the automatic stay. This Court will limit its consideration to the possessory interest only because the Motion for Relief can be resolved solely on that basis.

A party in interest, such as the Movants, may obtain relief from the automatic stay under the provisions of 11 U.S.C. § 362(d). Subsection (1) of § 362(d) provides that the court shall grant relief from the stay upon a showing of "cause" including (but not limited to) the lack of adequate protection of an interest in property.[13] Subsection (2) of § 362(d) provides that the court shall grant relief from the stay of an act against property of the debtor or of the estate if the debtor does not have equity in the property and the property is not necessary to an effective reorganization.[14] Subsection (3) of § 362(d) applies only in single asset commercial real estate cases and, therefore, is not applicable to this case.

The movant must carry the initial burden of establishing a prima facie case for relief before

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[13] 11 U.S.C. § 362(d)(1) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

[14] 11 U.S.C. § 362(d)(2) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if–
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization;

the debtor is required to go forward with his proof. Sonnax Industries, Inc., v. Tri Componetry Products Corp (In re Sonnax Industries, Inc.), 907 F.2d 1280 (2nd Cir. 1990); see also In re Marvin Johnson's Auto Service, Inc., 192 B.R. 1008 (Bankr. N.D. Ala. 1996). The Movant also has the ultimate burden of proof on the issue of the debtor's equity in the property. 11 U.S.C. § 362(g)(1). The debtor has the burden of proof on all other issues. 11 U.S.C. § 362(g)(2).

B. Relief from Stay under 11 U.S.C. §362(d)(2)

Subsections (A) and (B) of § 362(d)(2) are expressed in the conjunctive. Therefore, in order to grant the relief requested, this Court must find both that the Debtor does not have any equity in the property and that the property is not necessary to an effective reorganization. A debtor lacks equity under § 362(d)(2)(A) when the balance of all debts secured by liens on the property exceeds the fair market value of the property. Prestwood v. United States (In re Prestwood), 185 B.R. 358, 361 (M.D. Ala. 1995). The Movants bear the burden of proving the Debtor's lack of equity in the Property. The Movants filed a Proof of Claim for an arrearage related either to a purchase money mortgage or rent in the amount of $6,957.40. At the hearing, the Movants offered no other evidence establishing the amount or existence of the mortgage or rent. Therefore, either Movants did not seek relief under this section because of the dispute of ownership or Movants failed to prove the lack of equity. Either way, the Movants' failure to satisfy § 362(d)(2)(A) obviates any discussion of § 362(d)(2)(B)and relief from stay must be denied under § 362(d)(2).

C. Relief from Stay under 11 U.S.C. § 362(d)(1)

According to 11 U.S.C. § 362(d)(1), the court shall grant relief from stay upon a showing of "cause" including the lack of adequate protection of the movant's interest in the property. Cause under § 362(d)(1) is not defined by the Bankruptcy Code. Courts are left to determine whether cause

exists for granting a relief from stay based on the totality of circumstances in each case. Baldino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3rd Cir.1997); In re Brown, 290 B.R. 415, 423 (Bankr. M.D. Fla. 2003). Legislative history indicates that the "'facts of each request will determine whether relief is appropriate under the circumstances.'" In re Mazzeo, 167 F.3d 139, 142 (2nd Cir. 1999)(quoting H.R.REP. NO. 95-595, at 343-44 (1977), reprinted in 1978 U.S.C.C.A.N. 6300).

The Court should "consider the policies underlying the Bankruptcy Code as well as the competing interests of the creditor, debtor, and other parties in interest" when exercising its discretion in granting a motion for relief for cause. In re Borbidge, 81 B.R. 332, 335 (Bankr. E.D. Pa. 1998). Thus, cause is an inherently broad and flexible concept, allowing the bankruptcy court to resolve matters based on the unique facts of each situation.

1. Adequate Protection

Adequate protection is not explicitly defined in the Bankruptcy Code. However, the legislative history of the Code reveals that adequate protection is a concept meant to "insure that the secured creditor receives the value for which he bargained." Martin v. United States (In re Martin), 761 F.2d 472, 474 (8th Cir. 1985) (quoting S. REP. No. 989, 95th Cong., 2d Sess. 53, reprinted in 1978 U.S.C.C.A.N. 5787, 5839). The secured creditor's benefit of his bargain includes receipt of principal and interest payments, and upon default thereof, the right to foreclose on its interest in the property and to sell the property and reinvest the proceeds. In re Wolsky, 53 B.R. 751, 755 (Bankr. D. N.D. 1985). Congress intended for the value received by the secured creditor to be a concept adaptable to the "varying circumstances and changing modes of financing" with respect to each bankruptcy case. Martin, 761 F.2d at 474, (quoting H.R. REP. No. 595 at 339, 1978 U.S.C.C.A.N. 5963, 6295). In other words, whether a creditor is adequately protected should be determined on a

case-by-case basis.

The Code provides illustrations of what constitutes adequate protection ensuring that the secured creditor receives the value of his bargain. Under 11 U.S.C. §§ 361(1) and (3),[15] a secured creditor could receive periodic cash payments for depreciation of the value of its interest in the collateral during the plan or other relief which is the "indubitable equivalent" of that creditor's interest in the collateral during the plan. The phrase "indubitable equivalent" is also not defined in the Code, although Congress intended for it to mean "realization by the [secured party] of the value of its interest in the property involved." Martin, 761 F.2d at 476 (quoting H.R. REP. NO. 595 at 340, 1978 U.S.C.C.A.N. 5963, 6296).

While periodic adequate protection payments are one way to protect a secured creditor, an "equity cushion may itself provide adequate protection, obviating the need for periodic payments to protect the entity against the decline in value." 3 Collier on Bankruptcy ¶ 361.03[1] (Lawrence P. King, ed., 15th ed. rev. 1999). Judge Benjamin Cohen noted that "if a debtor has equity in a property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses, then the creditor is adequately protected." In re Mathews,

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[15] 11 U.S.C. §§ 361(1) and (3) provide:

> When adequate protection is required under section 362. . . of this title of an interest of an entity in property, such adequate protection may be provided by--
>
> > (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title. . . results in a decrease in the value of such entity's interest in such property; . . .
> >
> > (3) granting such other relief. . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

208 B.R. 506, 510-11 (Bankr. N.D. Ala. 1997) (quoting In re James River Assocs., 148 B.R. 790, 796 (E.D. Va. 1992)).

The Movants did not establish the exact amount of a mortgage balance or rent arrearage, although their claim is for $6951.40. The Debtor's bankruptcy schedules reflect the fair market value of the Property to be $53,500. The evidence before this Court shows that the Debtor has sporadically paid on the obligation to City West. The Debtor offered evidence that he made payments to City West in 2003 and 2004. The Movants contend the Debtor has made no payments for 2005. The Debtor disputes this, acknowledging an arrearage only for April through June. The Debtor testified that he got behind on the payments for these months due to unemployment and sickness, but he is currently employed and ready to resume payments. Admittedly, inconsistent or sporadic payments in some cases can be grounds for relief from stay. However, there is also a strong policy in favor of allowing people to retain their homes.[16] Mr. Flowers was truthful, candid and credible in his testimony and has provided the Court a reasonable justification for the missed payments. He is also paying other obligations by making his Chapter 13 payments and the Court is not persuaded that Movants are irreparably harmed by allowing the Debtor to resume the regular payments and to pay the arrearage. Therefore, the Court concludes that relief from stay is due to be denied to allow the Debtor an opportunity to amend his confirmed plan and retain his home.

2. Binding Effect of Confirmation

A Chapter 13 Plan that is confirmed binds the debtor and his creditors. 11 U.S.C. § 1327(a). "[A] bankruptcy court's order confirming a plan of reorganization is given the same effect as any

[16] "[T]he desire of homeowners to save their homes through Chapter 13" is consistent with the legislative intent behind the Bankruptcy Code. Green Tree Acceptance, Inc. v. Hoggle (In re Hoggle), 12 F.3d 1008,1010 (11th Cir. 1994).

district court's final judgment on the merits." Id. (citing In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990), cert. denied, 498 U.S. 959, 111 S. Ct. 387 (1990)). "An order confirming a Chapter 13 Plan is res judicata as to all justiciable issues which were or could have been decided at the confirmation hearing." Green Tree Financial Corp. v. Garrett (In re Garrett), 185 B.R. 620, 622 (Bankr. N.D. Ala. 1995) (quoting Anaheim Savings & Loan Assoc. v. Evans (In re Evans), 30 B.R. 530, 531 (9th Cir. BAP 1983). Once confirmed "the binding effect of the order precludes any of the parties from relief from the automatic stay based upon any facts occurring pre-confirmation." Id. at 623 (citing Lawson v. Lackey, 148 B.R. 626, 627 (Bankr. N.D. Ala. 1992)). Those parties affected include "debtors, creditors, trustees, and other parties in interest." Id. at 622. Res judicata "bars a court from relitigating issues that have been litigated in a cause [and] also bars a court from litigating the issues that may have been litigated.." In re Albert Young, Jr., 281 B.R. 74, 79 (Bankr. S.D. Ala. 2001). Confirmation orders are final judgments on the merits. Id. at 80.

On March 10, 2005, this Court confirmed the Debtor's Chapter 13 Plan. The Plan listed the debt owed to City West as long-term debt and provided that City West would be paid monthly. The Movants did not object to the Plan and raised no issue concerning the treatment of City West's claim as long-term debt. The Movants now ask this Court to treat Mr. Flowers' debt as rent, rather than a mortgage. The Movants' Proof of Claim filed on June 22, 2005, noted the basis for the claim to be "purchase money mortgage" and "rent." The Debtor has maintained the Property belongs to him and that City West has a mortgage interest in the Property and all of the schedules and the Debtor's Plan are consistent with this assertion. The claim filed by Movants asserts two inconsistent grounds for the basis of that debt. Thus, the Court finds that the Plan as confirmed is binding on Movants and their attempt to now call the debt rent rather than a purchase money mortgage is barred by the

doctrine of res judicata. Since the Plan treated the debt as a mortgage and this Plan was confirmed, the Movants can not now assert to the contrary that the debt is rent; such an assertion is untimely.

III. CONCLUSION

The Court finds that the Debtor does have an interest in the Property and that the Movants are adequately protected so long as the Debtor makes his payments pursuant to the Plan.

Based on these findings and conclusions, the Court finds that the Movants' Motion for Relief is due to be denied under § 362(d), conditioned upon the Debtor's continued payments pursuant to the Plan. Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that the Movants' Motion for Relief from the Automatic Stay is **DENIED**.

Dated this the 8th day of September, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:eaj
xc: Cindee Dale Holmes, Attorney for Debtor
Henry Taliaferro, Attorney for Movants
Charles King, Assistant Chapter 13 Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ROBERT R. BAZZELL	)	
	)	04-05851-TOM-7
Debtor,	)	
	)	
MARLO BAZZELL-SAUNDERS	)	
	)	
Plaintiff	)	
	)	
v.	)	A.P. No. 04-00137-TOM
	)	
ROBERT R. BAZZELL	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The matter before this Court is the complaint to determine the dischargeability of a hold-harmless obligation for a debt pursuant to 11 U.S.C. § 523(a)(15) filed by Marlo Bazzell-Saunders ("Plaintiff") in the above-styled Chapter 7 case of Robert R. Bazzell ("Debtor" or "Defendant"). At the trial on August 22, 2005, Debtor appeared with his counsel, Roy J. Brown, and Plaintiff appeared with her counsel, Frederick Mott Garfield. This Court has jurisdiction pursuant to 28 U.S.C. §1334(b) (1994)[1] and the district court's General Order Of Reference.[2] This is a core proceeding

[1] **28 U.S.C. §1334(b)** provides:
Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

[2] The **General Order of Reference Dated July 16, 1984, As Amended July 17, 1984** issued by the United States District Court for the Northern District of Alabama provides:
The general order of reference entered July 16, 1984, is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under

arising in a case under Title 11 of the United States Code as defined in 28 U.S.C. §157(b)(2)(I) (1994).[3]

The Court has considered the pleadings, the testimony and exhibits, the arguments and the law. The Court also has taken judicial notice of the documents filed in the Debtors' case as allowed by Federal Rule of Bankruptcy Procedure 9017.[4] In accordance with Federal Rule of Bankruptcy Procedure 7052,[5] the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

On June 30, 2004, Defendant filed this Chapter 7 bankruptcy case and on August 9, 2004, Plaintiff timely filed a complaint to determine the dischargeability of a debt in the Debtor's Chapter 7 case. Plaintiff alleges Debtor owes her a nondischargeable debt for $2,146.00 for a child support

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the Bankruptcy Act.

[3] **28 U.S.C. §157(b)(2)(I)** provides:
(b)(2)Core proceedings include, but are not limited to--
(I) determinations as to the dischargeability of particular debts;

[4] **Fed. R. Bankr. P. 9017, Evidence** provides the following:
The Federal Rules of Evidence and Rules 43, 44 and 44.1 F. R. Civ. P. apply in cases under the Code.

Fed. R. Evid. 201, Judicial Notice of Adjudicative Facts provides, in part:
(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When Discretionary. A court may take judicial notice, whether requested or not.
The Court may take judicial notice of such undisputed facts as the filing of documents in the main bankruptcy case with the Court and orders previously issued by the Court in the case. State of Florida v. Charley Toppino & Sons, Inc. 514 F.2d 700 (5th Cir. 1975).

[5] **Fed. R. Bankr. P. 7052, Findings by the Court** provides:
Rule 52 F.R. Civ. P. applies in adversary proceedings.
Fed. R. Civ. P. 52 Findings by the Court; Judgment on Partial Findings provides:
(a) In all actions tried upon the facts without a jury...the court shall find facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58...

arrearage. She also alleges that his agreement to hold her harmless as to the I.R.S. debt ($2,257.00) and the First Commercial Bank debt ($35,721.15) is a nondischargeable obligation. At trial, the parties stipulated that Debtor's obligation to the I.R.S. and for child support due to the Plaintiff are nondischargeable. Remaining is the Debtor's hold-harmless agreement in the Judgment of Divorce regarding the debt to First Commercial Bank (hereafter "the Loan") which Plaintiff alleges is of the type described in 11 U.S.C. § 523(a)(15) and is nondischargeable.[6]

A. Background Information

The Plaintiff testified that she and Mr. Bazzell married on October 1, 1994, and have two children. She also testified that while expecting their daughter in December 1999, they built a home together in Louisville, Kentucky.[7] Plaintiff testified that after they built their home in December 1999, they consolidated some debts and obtained a second mortgage on the home. When Mr. Bazzell transferred to Birmingham, the Bazzell's sold their home in Louisville. Ms. Bazzell-Saunders testified that the sale price was insufficient to pay both mortgages and to pay off the second mortgage on the Louisville home, she claims they took out the Loan with First Commercial Bank. Mr. Bazzell does not recall the purpose of the Loan.[8] The Promissory Note to First Commercial

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[6] First Commercial Bank filed suit in state court against the Plaintiff and Defendant on June 18, 2004, seeking a judgment for the balance due of $35,721.15. That suit is stayed as to the Defendant, and the Bank is awaiting the outcome of this action to pursue Plaintiff.

[7] Plaintiff's recollection is inconsistent, because Plaintiff originally testified that her daughter was born November 7, 1997, and her son was born October 25, 1999. Based on this testimony, in December 1999, both children would have been born by the time the Bazzell's began building a home in Louisville, Kentucky.

[8] Entered into evidence is a copy of the promissory note to First Commercial Bank. Defendant's Ex. 12. Attached to the note is a comments page stating that the Loan was made to "exercise stock options Marlo has with her employer, Papa Johns Pizza (corporate)." Although hearsay, the document is not being asserted for its truth, but to impeach Plaintiff's testimony that

admitted into evidence is dated April 22, 1999.[9] Defendant's Ex.12.

The parties decided to move back to Alabama, and when Debtor took a job in Birmingham with Maxus Construction, Inc., the Bazzell's bought a home in Pelham. Several years later, the Bazzells filed for divorce in Shelby County, Alabama and the Final Judgment of Divorce was entered February 6, 2003. Plaintiff's Ex. 1. Pursuant to the divorce decree, which adopted the agreement of the parties, the assets and obligations were divided and custody and child support were determined. In paragraph 25 of the Divorce Agreement, Mr. Bazzell agreed to assume responsibility for the First Commercial Loan[10] and to hold harmless Ms. Bazzell-Saunders. Id. Plaintiff testified that Defendant was to start paying off the debt before the divorce, and Defendant has made 12 payments on the First Commercial Loan. Defendant's Ex. 12. The payments ranged from $416.70 to $479.22 and were made between March 2002 and March 2003. Id.

B. Plaintiff's Financial Information

At the time of the divorce, Plaintiff testified she was vice-president of human resources for P.J. Cheese, Inc.[11] On August 23, 2003, about six months after her divorce from Defendant,

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the Loan was to pay off a second mortgage on the Louisville home. Such extrinsic evidence is admissible as a prior inconsistent statement pursuant to Federal Rule of Evidence 613. See also Fed. R .Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.")

[9] Thus the Plaintiff's testimony is confusing, because if the Loan was to cover the short fall from the sale of the Louisville home, it should have been entered into after they built the home in December 1999, not before.

[10] The amount indicated in the Judgment of Divorce was $20,000.00. Plaintiff's Ex. 1. The suit filed by First Commercial Bank seeks a judgment for $35,721.15. Plaintiff's Ex. 3.

[11]P.J. Cheese, Inc. is also known as Papa John's. Plaintiff testified she had fringe benefits with her employment, including a 401k and health and dental insurance.

Plaintiff testified she does not have a college degree, but attended Auburn University for

Plaintiff married Stephen Saunders, and they reside in Richmond, Virginia. After her move to Virginia, she continued to work with P.J. Cheese for a while and then quit in December of 2003. She testified that she has no current ownership in P.J. Cheese.[12] The joint tax return of the Plaintiff and Mr. Saunders for 2003 was for $229,406.00. Defendant's Ex. 3. At the time of filing the return, Plaintiff was working and had a base salary of $74,000.00. The next year, 2004, the Saunders' joint tax return was for $150,000.00. Defendant's Ex. 3A. This reflects the income reduction following Plaintiff's resignation from her job. She and Mr. Saunders have several joint accounts, including a savings account with a balance of $6,911.77 from February 2004 to April 2005. Defendant's Ex. 5 through 7.

Plaintiff and Mr. Saunders have custody of their one-year-old daughter, Selena, in addition to the Plaintiff's two children with the Defendant and Mr. Saunders' daughter from his previous marriage. Plaintiff testified that Mr. Saunders supports their family and that she is currently receiving $625.00 a month in child support.[13] The Virginia home Plaintiff shares with her husband was purchased recently and is in his name only. Mr. Saunders pays all the expenses for the family, including the cost of a housekeeper. Ms. Bazzell-Saunders drives a 2002 Oldsmobile mini-van,

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one year and took some classes at University of Alabama in Birmingham.

[12]This was a privately-held company beginning in 2001. Plaintiff testified that while employed there she could purchase ownership in the corporation through pay-roll deduction. She testified to paying on a $20,000.00 promissory note she gave to P.J. Cheese to purchase that amount of ownership in the company. If she had paid off the note and the company was doing well, Plaintiff could have had an ownership interest. Plaintiff denied these "stock options" were the reason for the Loan.

[13]Plaintiff and Defendant entered into an agreement subsequent to the divorce. A consent order entered by the circuit court lowered the Defendant's child support from $1,148.40 to $625.00 a month. Plaintiff's Ex. 2.

valued around $7,000.00, that is paid for and in her name.

Pursuant to the Divorce Agreement, Plaintiff was awarded ownership of the home in Pelham and she refinanced it so the property and the mortgage are in her name only. Plaintiff's Ex. 1. Plaintiff testified she has had the home rented in the past for $1,200.00 per month, but is unable to rent the home right now due to cosmetic problems. However, Ms. Bazzell-Saunders testified the present value of the home is around $125,000.00, roughly the amount of the mortgage, but believes the home would sell for less due to needed repairs. The IRS has a lien on the Pelham home for taxes owed from Plaintiff and Defendant's joint filings in 2001 and 2002. Plaintiff's Ex. 7. Plaintiff testified she paid her half of the taxes, but Defendant still owes around $2,250.00 plus interest and penalties.

If the debt to Plaintiff (the hold-harmless provision regarding the First Commercial Loan) is discharged, Ms. Bazzell-Saunders, who testified she is currently a stay-at-home mother, contends she will have to return to work to pay off the Loan. This would allegedly hurt her marriage and children, because she would have to put them in day care which would cost around $500.00 a week for four children. Plaintiff testified that her husband has indicated that he will not pay this debt.

C. Defendant's Financial Information

1. Income and Expenses

For 2003, Defendant worked for Maxus and earned $52,363.00, and when he filed bankruptcy in 2004, his monthly income with Maxus was $3,279.00 and his annual income was $53,244.35. Defendant's Ex. 9 and 10. In 2005, Defendant changed jobs and began working for

Innovative Contracting Solutions, Inc. ("ICS").[14] He makes around $52,600.00 a year. Defendant's Ex. 11.

After the divorce in early 2003, Defendant moved into an apartment and by the time he filed this bankruptcy case in 2004, his monthly expenses were around $3,310.00. A summary of his current monthly expenses are as follows:[15]

Item	**Expense**
Food	$400.00
Rent	$755.00
Utilities/ Phone/Water	$175.00
Doctor/Dentist/Drugs	$26.33
Clothes/Barber	$86.00
Car Payments and Maintenance	$700.00
Gas	$300.00
Car Insurance	$104.00*[16]
Child Support	$625.00
Children's Travel and Day Care	$245.83
Entertainment	$200.00
Church	$200.00*
IRA Contribution	$100.00

[14]Mr. Bazzell testified that he often worked in the Florida panhandle while employed with Maxus. Although he received reimbursement for travel, food and gas, it did not cover all his expenses. ICS pays him less, but he works locally and saves on travel expenses.

[15]See Defendant's Ex. 7. Defendant testified that his net pay check has already deducted his health insurance, so that amount is excluded from this list of expenses.

[16]These * items reflect the amount testified to at the trial as compared with Defendant's Ex. 8.

Life Insurance	$67.00
IRS Debt	$100.00
Miscellaneous	$146.66
Total Expenses	**$4,230.82**
Net Monthly Income	**$3,041.95**[17]

Defendant testified that this list more accurately depicts his expenses than his bankruptcy schedules. His total monthly expenses are greater than his net income, creating a short-fall of $1,188.87[18] per month. He does not have a 401K, but has just started putting money into an IRA each month. He is currently on a payment plan with the IRS to pay off his share of the taxes. He drives a 1998 truck with 140,000 miles. Defendant testified that in January 2005, he incurred truck repair expenses of $4,400.00. He is also responsible for his children's expenses for travel to Birmingham and home when he gets his visitation, and he pays for their child care while they are with him.[19] The children's travel expense in the last 12 months was $3,500.00. He testified that he recently obtained a new credit card to pay for the children's air fare and the balance of his truck repairs.

Defendant has been a construction superintendent for seven years and testified that he has little opportunity to "move up."[20] In this superintendent position, he hopes to some day advance in

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[17]This figure is based on Defendant's weekly net income less taxes. Defendant's Ex. 11. At trial, Defendant testified his net income was $3,025.22.

[18] At trial, Defendant testified his deficit was $1,341.38 a month.

[19] The Consent Order allows the Defendant to see his children for half the summer, half of spring break and one week at Christmas. Plaintiff's Ex. 2.

[20]Mr. Bazzell testified he attended high school and in 1986, completed a technical school.

his job and acquire bigger projects. His current salary is comparable to those similarly situated in other companies. He has not received any bonuses while working for ICS and his work allows no time for side jobs. The Defendant argues that he has no ability to pay the First Commercial Loan. He asserts that he assumed the Loan payments in good faith, but if he is unable to discharge the obligation in bankruptcy, it will result in greater hardship towards him than any benefit to Plaintiff.

2.Assets and Liabilities

The following table summarizes pertinent asset and liability information reflected in the Chapter 7 schedules:

Assets and Liabilities	Value or Amount
Household goods/furniture	$800.00
Total Assets	$12,455.00[21]
First Commercial Bank Loan	$35,000.00
IRS	$5,185.16
Credit Cards	$10,987.90[22]
Total Liabilities	$67,174.06

Defendant testified that after his divorce he incurred some debt on his credit cards to pay living expenses and child support and that these debts were part of the decision to file this bankruptcy case.

II Conclusions of Law

There are two issues raised in the dischargeability proceeding. First, whether a $35,721.15

[21]This includes a 1998 Dodge Ram valued around $10,000.00 in Schedule B.

[22]There were two credit card debts listed in the schedules. Defendant disputed the $7,359.92 debt listed to Providian National Bank. He claims he had two Providian credit cards for living expenses: one with an amount of $1,500.00 and another he does not recall.

debt owed by Debtor to Plaintiff is of the type described in 11 U.S.C. § 523(a)(15) as nondischargeable. Second, whether the debt is dischargeable under either subsection (A) or (B) of § 523(a)(15). The parties stipulated[23] that Plaintiff must establish the marital debt obligation exists and its occurrence. Once this burden is met the burden shifts to Defendant to establish ability to pay and its detrimental consequences to the parties. If the debtor meets his burden under § 523(a)(15)(A) and (B), the burden shifts to the Plaintiff to rebut.

(A) Whether the Debt is Nondischargeable Under § 523(a)(15)

Under the provisions of 11 U.S.C. § 523, creditors may seek to have particular debts owed to them excepted from a debtor's discharge in bankruptcy. However, in furtherance of Congress' fresh start policy for debtors under the Bankruptcy Code, such exceptions to discharge should be construed strictly in favor of the debtor. In re Fretz, 244 F.3d 1323, 1327 (11th Cir. 2001)(citing In re Griffith, 206 F.3d 1389, 1394 (11th Cir. 2000); Local Loan Co. v. Hunt, 292 U.S. 234 (1934). Congress added § 523(a)(15) to the list of nondischargeable debts as part of the Bankruptcy Reform Act of 1994. 4 Lawrence P. King, Collier On Bankruptcy ¶ 523.21 (15th ed. rev. 1997). Section 523(a)(15) limits the debtor's ability to discharge non-support types of marital property debts arising from a separation or divorce to two situations: where the debtor is unable to pay such debts or where the benefit to the debtor of nonpayment outweighs the resulting detriment to the nondebtor spouse.

Specifically, § 523(a)(15) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement,

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[23]The parties rely on In re Stone, 199 B.R. 753, 783 (Bankr. N.D. Ala. 1996). See also In re Reetz, 281 B.R. 54 (Bankr. S.D. Ala. 2001).

divorce decree or other order of a court of record...unless —

> (A) the debtor does not have the ability to pay such debt from the income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor...; or
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The plain language of this section contemplates that the debt in question must be owed to the former spouse, must have arisen from a court order issued in a separation or divorce proceeding and must not be of the type described in § 523(a)(5)[24] - i.e., a debt that is "actually in the nature of alimony, maintenance or support."

Plaintiff's complaint alleges that the debt at issue is nondischargeable pursuant to § 523(a)(15) and neither party has alleged nor asserted that this debt is in the nature of alimony, maintenance or support. Additionally, the debt seems to clearly be a hold-harmless obligation incurred by the Defendant pursuant to the Divorce Agreement, rather than maintenance, alimony or support. Further, the Divorce Agreement contained a separate provision for "Child Support" in paragraph 13, which was to be paid at the rate of $1,148.40[25] monthly. Therefore, this $35,721.15 Loan assumed by Debtor and the subject of a hold-harmless provision of the Divorce Agreement is

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[24] **11 U.S.C. § 523(a)(5)** provides in part:
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt—

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
> ... such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

[25] Currently this amount is $625.00 a month, pursuant to a consent order. Plaintiff's Ex. 2.

of the type described in § 523(a)(15) and it is not a § 523(a)(5) debt "actually in the nature of alimony, maintenance or support."

(B) Whether the Debt is Dischargeable Under Subsection (A) or (B)

This hold-harmless agreement regarding the First Commercial Loan obligation is dischargeable if the Debtor can show either an inability to pay under subsection (A) or that under subsection (B) nonpayment of the debt will result in a benefit to Debtor that outweighs the detrimental consequences to Plaintiff.

(1) Subsection (A): Debtor's Inability to Pay the Debt

Courts have considered many factors in analyzing whether the debtor has the ability to repay the nonsupport marital debt, including whether forcing the debtor to pay the debt will "reduce the debtor's income below the amount which is necessary for the support of himself and his dependants." In re Reetz, 281 B.R. at 58. This inquiry examines a debtor's present and future financial circumstances. Id.; See Matter of McGinnis, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996). "A debtor has the ability to pay an obligation, for purposes of 11 U.S.C. § 523(a)(15), if the debtor has sufficient disposable income to pay all or part of the property settlement within a reasonable amount of time." Id. at 59 (quoting In re Smithers 194 B.R. 102 (Bankr. W.D. Ky. 1996)).

The legislative history of § 523(a)(15) with respect to subsection (A) provides the following guidance for courts analyzing a debtor's ability to pay the nonsupport debt:

> In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such

> obligations nondischargeable in cases where the debtor has the ability to pay them...In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents.

H.R. Rep. No. 835, 103d Cong., 2nd Sess. 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3363. Based on the legislative history, this Court concludes that where the debtor either agreed to pay or was ordered by a domestic court to pay the obligation owed to a former family member by making periodic payments over a period of time, Congress intended the bankruptcy court to determine the debtor's ability to pay by looking at feasibility and cash flow over a similar period of time and not just the ability to pay on a particular day. This long-term approach to determining the debtor's ability to pay necessarily includes analyzing whether the debtor has the present ability to pay the debt and whether he is likely to be able to pay this debt in the future. Thus, this Court must consider the following with respect to Debtor: history of employment and salary, potential or likely future employment, and living expenses historically and in the future. Accordingly, the Court will consider Debtor's income and expenses at the time of filing the Chapter 7 petition and at the time of trial.

Debtor and Plaintiff divorced in February of 2003, and Debtor assumed responsibility for the First Commercial Loan in the Divorce Agreement. At the time, he was still employed with Maxus, earning $52,363.00 in 2003. When he filed bankruptcy in 2004, Defendant earned $53,244.35 annually, but his liabilities (including the Loan) exceeded his assets by $54,719.06 and his expenses exceeded his income by $31.00. In 2005, the Defendant began working for ICS, earning $52,600.00 annually. Currently, his monthly expenses exceed his monthly income by $1,324.76.

The Defendant does not expect any substantial increases in his pay in the near future, because his salary is consistent with what others make in his field. It is possible, he testified, that he may be

able to move up to bigger projects and earn more, but that is uncertain and too speculative in this Court's view. He also testified that his job is demanding and not merely a forty-hour a week job, so that there is no time for him to supplement his income with outside or additional employment. No contrary evidence regarding Defendant's income or potential to earn income was offered. It appears to the Court that Defendant's income is likely to remain at or near the current amount of around $53,000.00 or $54,000.00.

There was no testimony at trial to suggest Defendant's monthly expenses as listed either in the schedules or in Defendant's Ex. 8 are extravagant. Although his monthly expenses have increased since filing his schedules, the Court does not find them excessive. His food expense increased because the schedules reflect only his grocery bills and no lunches or eating out, and this Court finds $400.00 a month on food to be reasonable. The Defendant does not drive a new or luxury vehicle and in fact, he incurred increased car expense due to repair work on an older vehicle with high mileage. Mr. Bazzell's rent payments have increased $100.00 because he is on a month to month basis as he looks for a cheaper place to live. Furthermore, $755.00 a month on rent is not extravagant considering that he needs sufficient room for his children's visits. The children's daycare and travel expenses are well detailed, appear reasonable and are listed in his expenses, and he has merely allocated these items over 12 months. He is also allotting $100.00 monthly that he intends to pay to the I.R.S. and has stipulated he will pay amounts owed and to be owed regarding child support. Mr. Bazzell might be able cut back on his $200.00 monthly entertainment expenses, but eliminating this would still leave a deficit of nearly $1,000.00 a month. This Court finds that based upon the testimony and evidence, Defendant does not appear to be able to make any payments on the bank Loan.

(2) Subsection (B): The Balancing Test

Under this discharge exception, the Court must weigh the benefit to Debtor of discharging the debt against the detrimental consequences to Plaintiff of discharging the debt. This test requires more than a comparative determination of which party is in the better position with respect to payment or nonpayment of the debt.[26] Rather, it requires a subjective analysis to determine whether the benefit from relieving Debtor of the obligation to pay this debt exceeds the resulting harm to Plaintiff from nonpayment of the debt. Factors that bankruptcy courts consider in balancing the debtor's benefit and plaintiff's detriment in the event of discharge include the parties' current income and expenses, employment and potential employment, number of dependents, and assets and liabilities.[27] This Court will consider these factors and also feels it should consider the parties' relative and respective lifestyles at the time of divorce and as they are presently, and what they are likely to be in the future in order to determine the benefit to Debtor and the harm to Plaintiff if the debt is discharged.

Pursuant to the Divorce Agreement, Plaintiff received the marital home in Pelham, Alabama. She contends it is more of a liability than an asset due to cosmetic problems and I.R.S. liens. The home has, however, previously rented for $1,200.00 a month. In addition, at the time of the divorce

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[26] See Anthony v. Anthony (In re Anthony), 190 B.R. 429, 433 (Bankr. N.D. Ala. 1995): "The (balancing) test is not which party is in the better position to pay the debt. The test is whether the benefit to the Debtor outweighs the harm to (the Plaintiff ex-spouse)." Clearly, when two people and often their children split one household into two, neither is in as good a financial position as before the split.

[27] In re Christison, 201 B.R. 298, 310-12 (Bankr. M.D. Fla. 1996); Humiston v. Huddleston (In re Huddleston), 194 B.R. 681, 689-90 (Bankr. N.D. Ga. 1996); In re Dressler, 194 B.R. 290, 305-6 (Bankr. D.R.I. 1996); Anthony v.Anthony (In re Anthony), 190 B.R. 433, 439-40 (Bankr. N.D. Ala. 1995), *aff'd on reh'g*, 190 B.R. 429 (Bankr. N.D. Ala. 1995); In re Hill, 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995).

in 2003, Plaintiff had an earning capacity of $74,000.00 a year as vice-president of human resources for P.J. Cheese, Inc. When she married Mr. Saunders, their joint income for 2003 was over $225,000.00 and even after quitting her job in December 2003, the 2004 tax return shows income available to them as a couple to be $150,000.00. Ms. Bazzell-Saunders is presently staying at home to raise four children and pursuant to the Consent Order, is receiving child support of $625.00 per month from Defendant. However, Mr. Saunders financially supports his wife and family; this support includes payment of the mortgage, all utilities, groceries, clothing, insurance, all transportation expenses and even a housekeeper. It appears from Plaintiff's testimony that her current husband is able and willing to continue to support her and their family in this fashion. If Mr. Saunders is, as Plaintiff testified, unwilling to pay this loan, the worse case scenarios for Plaintiff are that either she file her own bankruptcy case (to discharge her obligation to First Commercial) or she could return to work and put the children in daycare to allow her to have income to pay First Commercial. Although daycare is expensive, Plaintiff's employment history reflects she was earning more than Defendant when she quit her job and based on that salary, she would have more than sufficient income to pay daycare and the Loan payments. While the Court recognizes that Plaintiff prefers to be a stay-at-home mother, the Court cannot ignore the pure dollars and cents. She can work, pay daycare and pay the Loan even if she would prefer not to do so.

In comparison, Debtor has no disposable income to put towards the Loan. His liabilities and expenses already outweigh his assets and income. To not discharge this debt would result in his going further in the hole each and every month and would result in a great detriment to Mr. Bazzell outweighing any benefit Plaintiff would receive from a determination that the debt is nondischargeable. "A bankruptcy court should not deny the debtor his fresh start simply because his

former wife has chosen not to seek the same relief on her own behalf when her circumstances warrant it." In re Reetz, 281 B.R. at 60 (citing In re Daiker, 5 B.R. 348, 352 (Bankr. D. Minn. 1980). Defendant seeks a fresh start from the Chapter 7 bankruptcy. His lifestyle is not extravagant and he is paying child support. Defendant has a solid job and has maximized his earning capacity. He is trying to make ends meet and has no excess funds from which he can pay the Loan.

An additional factor to be considered in this case is that the date of the Loan document is inconsistent with the Plaintiff's recollection of the facts. She testified that the Loan was to pay the balance of the second mortgage on the Louisville house so they could close the sale on the home. However, she also had testified the home was built in December of 1999, around eight months after the Loan was originally made.[28] Finally, no explanation was provided why the Judgment of Divorce referenced a loan to First Commercial in the amount of $20,000.00 when the note was for $37,673.00. Since this complaint was brought by the Plaintiff, this information and explanation should have been provided by her. This Court finds the Debtor's benefit of a discharge of this debt far outweighs any alleged detriment to Plaintiff, including the burden of daycare costs and a home that allegedly cannot be rented.

III. Conclusion

The $20,000.00 owed by Defendant to Plaintiff as a result of the hold-harmless provision pursuant to the parties' Divorce Agreement is not a debt actually in the nature of alimony, maintenance or support as defined in § 523(a)(5). However, it is the type of debt included in § 523(a)(15) and pursuant to subsections (A) and (B) this obligation is due to be discharged.

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[28] She also inconsistently testified about the date of her children's births, alleging to have had both children by October 1999, but to have been pregnant with her daughter in December 1999, when they built the home in Louisville. See note 7, supra.

Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief sought by the Plaintiff, Marlo Bazzell-Saunders, in the Complaint is **DENIED** and the hold-harmless agreement regarding the debt to First Commercial Bank in the Final Judgement of Divorce dissolving the marriage of Marlo Bazzell-Saunders and Robert Bazzell is declared **DISCHARGEABLE**.

Dated this the 4th day of October, 2005.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:eaj

xc: Frederick Mott Garfield, Attorney for Plaintiff
Roy J. Brown, Attorney for Defendant